SUPREME COURT OF THE UNITED STATES.

THOMAS M. ADAMS AND E. C. MEANS, ADMINISTRATORS, WITH THE WILL ANNEXED, OF THE ESTATE OF THOMAS W. MEANS, DECEASED.

Petitioners,

vs.

BENJAMIN R. COWAN, EVAN F. WILLIAMS AND A. S. FRAZER, TRUSTEES,

Respondents.

Petition for writ of Certiorari.

STATEMENT.

Thomas W. Means of Ashland, Ky., died testate June 8, 1890, with no debts, possessed of a personal estate valued at over a half million dollars besides some realty. His estate was devised and bequeathed in substantially equal parts to his four children and grandson, only child of a deceased daughter. The fifth item of the will, executed in 1880, reads as follows:—

"Item 5. I have made advances to my said children which are charged to them respectively on my books, and I may make further advances to them respectively, or to some of them, and to my said grandson, which may be charged on my books to their respective accounts, I desire the equal provision herein made for said children, and the provision for

said grandson, to be a provision for them respectively, in addition to said advances made, and that may hereafter be made and that in the division, distribution and settlement of my said estate said advances made, and that may hereafter be made, be treated not as advancements, but as gifts not in any manner to be accounted for by my said children and grandson or any of them, or the issue of any of them."

William Means, one of the four children, resided with his family—wife and three daughters—in Greene County, Ohio.

In February, 1890, by way of composing and settling family differences both of a personal and property nature, he agreed with the wife and daughters in full satisfaction of all their claims against him, which were then accordingly renounced by them, and as a reasonable and proper family arrangement and a settlment in equity upon them, to convey by deed of trust to a trustee his interest in expectancy in his father's estate, with a covenant that upon the father's death he would execute all necessary transfers and conveyances completely to execute and carry out the agreement and settlement, upon the trust that the property should be held for the education of his children and the support of his family, &c. &c. (See Hinkle vs. Wanzer, 17 How. U. S. 368.) The father having died and William having failed to carry out said contract and complete said settlement as agreed, a suit was instituted against him by the wife and daughters in the Common Pleas Court of that county, to compel specific performance of the contract on his part. A decree was rendered in their favor August, 1891, granting the prayer of their petitionand appointing the respondents trustees to secure his share in said estate, and vesting them with the necessary power for the purpose.

The respondents, all residents of Ohio, brought suit in the Circuit Court of the United States for the District of Kentucky, Nov. 16, 1891, against the petitioners, all residents

of Kentucky, to recover William Means' said share in said estate, and to set aside a receipt for $136,035.75, theretofore, to-wit: Oct. 16, 1890, given by him to defendants in alleged payment on account of such share.

At that time, for reasons not necessary to be gone into, William Means was not in accord with his family, and acted under advice of independent counsel. On Dec. 26, 1891, he executed and delivered to said trustees a conveyance of his share in his father's estate, in pursuance of the decree of said Common Pleas Court, which fact was set up in the case by supplemental bill, Jan. 18, 1892. The case was tried in the Circuit Court and a judgment rendered for the defendants, petitioners here, in May, 1895.

The complainants, respondents here, thereupon appealed to the United States Circuit Court of Appeals for the Sixth Circuit which, in February, 1897, unanimously reversed the judgment of the Circuit Court, and directed a decree for complainants setting aside said receipt, requiring an accounting for the purpose of ascertaining the amount due in respect of the legacy of William Means, and a recovery thereof by complainants. An application with full argument covering twenty-two printed pages for a rehearing, based largely upon an alleged mistake or oversight by the court in respect to an item of a $45,000 note which went to make up the amount of the receipt, was filed by defendants. Two months thereafter the same was denied by the court without dissent.

We are not advised of the specific grounds on which the petitioners are about to ask for a writ of *certiorari* to bring the case under review by this court. But judging from the application for a rehearing that they may have some relation to the $45,000 note, which it was complained had been overlooked by the court as to its true relations to the

will, I beg to refer to that matter just as though, if the complaint were well founded, the subject could properly be considered on this application for a writ. In this connection it becomes pertinent to make a further statement deduced from the record:

By the failure of the Metropolitan National Bank of Cincinnati in the early part of the year 1888, and by the efforts of William Means, who was its President (he having unwarily become connected with it after the foundation of its troubles had been laid) to avert the calamity, he became heavily involved. His father came to his rescue, and during the fore part of the year '88 paid, without William's solicitations and largely without his knowledge, his pressing debts and charged the advances so made to him on his (the father's) books. The total thus paid was large. It was much reduced, however, by the collaterals which were taken by the father at their value and credited on the account. The father was aged and infirm, and the business was done by his direction through his older son, John Means, who for some years had acted as his agent and attorney in fact, in ordinary affairs. Subsequent to the payments so made and charged, the agent deemed it best, as he wrote William, in view of the possible demands of creditors in case of the father's death, and by way of "better assurance" that notes be given for the sums so paid or assumed and charged, and still later, (Nov. 1888) that at least a part of the notes should be made a specific charge upon William's expectancy to avoid the operation of the fifth item of the will (See R. 215 *et seq.*, 727-8)—though this purpose was not communicated to William.

The taking of these notes was without the father's knowledge. He never knew of them. They all had for their bases, as stated, these charges on the testator's books.

It was for the balance alleged to be due on them that the receipt in question was given.

The amount of the $45,000 note was included in the cancelled receipt. It was contended in the application for rehearing that the Court failed to distinguish this note from the others, that it stands upon a different footing from the rest and was clearly a charge upon the expectancy, &c. They call attention to the fact that counsel for the Trustees recognized a distinction; but they do not allude to the significant fact that they themselves in their elaborate arguments, never once hinted at the distinction prior to their application for a re-hearing. The case was elaborately argued before both Courts orally and by briefs.

Every question that could arise under the pleadings or under the evidence with the pleadings conformed thereto, and some beyond the range of the case, were discussed, save only that defendants did not present the *now* alleged peculiarity of this $45,000 note.

After the oral argument in the Court of Appeals leave was granted the trustees to print a brief used in the hearing with the right to defendants to print a reply.

In this brief a distinction was noted in one respect (not affecting the merits of the controversy) between this note and the others going to make up the amount of the receipt, in the following passage:

"We repeat with confidence that the notes made subsequent to the advances do not in any manner change the character of the charges on the books; that these charges stand just as they would had no notes been given, and thus standing they fall admittedly under the 5th item. Indeed, the advances would fall under it just the same if no charge had been made, but notes taken instead. For the testator does not say he will charge any advances he may make in the future on his books. He says they "*may* be charged on my books" and of course may not be. But this question is not

involved, for all the advances of 1888 were, in fact, so charged. They are no less advances because notes were taken.

That such was the effect appears to have been the view of John Means and his attorneys, Messrs. Hagar & Moore, in the fall of 1888. (R. 215, 727.) Then in order to avoid that effect, it was determined to have William Means give the four notes with the contract clause added to make them a charge against his expectancy. This transaction was most remarkable. It was nothing less than an attempt by third persons to change the course of the property of Thomas W. Means from that mapped out by him in his will. It was in effect a movement to add a codicil to the will without the participation of the testator. In this connection it is to be noted:

1. Admittedly Thomas W. Means had no knowledge of this business, either then, before or afterwards.

2. There was no cosideration for the memorandum contract to charge the expectancy, as to *three* of the notes.

Whatever went to make up their consideration had been long before paid and charged against William. They were completed transactions. The $45,000 note stood upon a different ground. It was for a consideration yet to be performed. If Thomas W. Means had known of this transaction and been a party to it, there would be no disposition to question its standing in equity, under the doctrine of Quarles *vs.* Quarles, 4 Mass. 680, and Kenney *vs.* Tucker, 8 Mass. 143; but with this qualification: We would then submit to the Court whether the agreement between William and his father to charge the expectancy was effected by the 5th item—whether that would not strike down the debt and leave no foundation for the agreement to charge, etc., to rest on."

Although their attention was thus called to *a* distinction between this note and the rest, they made no allusion to it in their reply, covering a number of printed pages. There was never the remotest suggestion by them that the other notes might fall under the operation of the 5th item of the will, and this one remain a charge upon the expectancy, nor any other claim that it should be distinguished from them. For the first time this claim was put forward on the application for a re-hearing. They were then too late, if the claim ever had

merit. As stated the case had been elaborately argued before both Courts. Each took about eight months to consider it, and announced their conclusions in elaborate opinions; and when this claim was put forward for the first time on the application for a re-hearing the Court took two months more to consider it. It is submitted that, under the circumstances, if the case were now under review, this belated contention of defendants below would be entitled to little weight.

The other objections urged in the application for a re-hearing were of a technical or unsubstantial nature. At least they did not go to the real matters in controversy.

There were some things said in the application by way of unwarranted deductions from the evidence. For instance, when it is remembered that William Means had on deposit with the Metropolitan Bank at the time of its failure collaterals, reasonably relied on as many thousand dollars in value in excess of his loan from the bank and the Labrot fund, collaterals for *that* fund as well as collaterals for the bank, and which were disposed of without his knowledge when he was sick and unable to give attention to his affairs, it is unjust to speak of his "defalcation to the Labrot estate." There was no such thing in fact as a defalcation. But—enough of this.

The truth is the substantial contention of defendants from the beginning and all though the controversy was that "William Means was without interest in the estate of his father, so far as the same should be necessary to pay his indebtedness evidenced by his notes"—*all* of them; that the notes "evidenced debts and not advancements" or "advances" and did not come under the operation of item five of the will properly construed, their construction being that of the Circuit Court. Their construction of the will on which they planted themselves and relied for a recovery was not adopted

by the Circuit Court of Appeals. That Court thought the will meant what it said; defendants thought it meant the contrary of what it said. There is the difference; and there is the chief cause of defendants' disappointment.

APPLICATION OF THE LAW.

The foregoing statement is sufficient to show:

(1) There is no question of public concern involved in this litigation. Private rights alone are affected, and these are confined to less than a dozen people—to be exact, to just nine. No one else can have the slightest concern in the litigation.

(2) The questions raised and decided are not "grave and important." In fact they are neither the one nor the other, except as that may be true of any suit. To the individual parties in nearly every case the result may be said, in a limited sense, to be important and in many a one to be grave also. How can this case be said to be grave and important in any sense not equally applicable to almost any other? The amount involved certainly is not to be considered. That is always relative in such a sense. A hundred dollars may be more important to one than a hundred thousand to another. If Congress had intended a discrimination in favor of large claims it would have fixed the limit. For the Court to do so would be to indulge in judicial legislation. If to lose or gain a law suit is a "grave" matter the element of gravity is present, but not otherwise. But the sense in which the terms are employed by this Court, in elucidating the *certiorari* clause of the Evarts act, is broad and comprehensive. It involves the consideration of the *general weal.*

(3) There is no question of uniformity of decision arising in the case. The writ cannot consequently issue.

Lau Ow Bew v. United States, 141 U. S., 563, and 144 U. S., 47.

In re Woods, 143 U. S., 202.

Am. Const. Co. v. Railway, 148 U. S., 372.

In the last case the Court, page 383, say of the provision pertaining to review by the Supreme Court under writs of *certiorari*, that the jurisdiction "should be exercised sparingly and with *great caution, and only in cases of peculiar gravity and general importance*, or in order to secure uniformity of decision."

"Accordingly, while there have been many applications to this court for writs of *certiorari* to the Circuit Court of Appeals under this provision, two only have been granted: the one in Lau Ow Bew's case, above cited, which involved a grave question of public international law, affecting the relations between the United States and a foreign country; the other in Fabre, Petitioner, No. 1237 of the present term, an admiralty case, which presented an important question as to the rules of navigation, and in which the decree of the Circuit Court of Appeals for the Second Circuit reversed a decree of the District Judge, and was dissented from by one of the three Circuit Judges; and in each of those cases the Circuit Court of Appeals had declined to certify the question to this Court."

There was no dissent in our case. There was no refusal to certify any question to this Court, for no such certificate was requested.

How, then, counsel for petitioners can claim this case even borders upon, much less falls within, the very limited classes of cases which, under established law, can be brought before the Supreme Court for review by *certiorari* to Circuit Courts of Appeals, is, of course, for them to show—if they can.

To ask the admission of this case for review, as it seems to me, is to ask the Court to disregard its holdings on the subject—to throw down the bars, and to ignore the judicially declared manifest purpose of the Judiciary Act of 1891,

namely: to relieve the Supreme Court "of the oppressive burden of general litigation, which impeded the examination and disposition of cases of *public concern*, and delayed suitors in the pursuit of justice;" and to distribute between the Supreme Court and the Circuit Court of Appeals "substantially the entire appeleate jurisdiction over the Circuit Courts of the United States."

In re, Woods *supra.*,

Carey v. Railroad, 150 U. S., 179.

United States v. Rider, 163 U. S., 139.

In a recent case, *In re* Chetwood, 165 U. S., 443, this Court allowed a writ of *certiorari* to the U. S. Circuit Court for the Northern District of California, under the provisions of the Judiciary Act of 1789, in a contempt proceeding where the construction of certain provisions of the National Bank Act, and the personal liberty of one wrongfully adjudged in contempt, were involved. There the Court say:

"Judgments in proceedings in contempt are not reviewable here on appeal or error; * * * but they may be reached by *certiorari* in the absence of any other adequate remedy."

But our case cannot be placed in the category of that one, among other reasons because the judgment of the Circuit Court of Appeals is *final* unless brought into this Court through the narrow door of the Act of March 3, 1891, and, of course, within the rules defined by this Court.

This case concerns the distribution of a considerable amount of funds in the hands of Administrators, now long delayed, and it is earnestly hoped the Court may dispose of the petition before the present term be finally adjourned.

Respectfully submitted,

JOHN LITTLE,

of Counsel for Respondents.

No. 113.

Br. of Harmon & Little for Resps

Office Supreme Court U. S.
FILED
DEC 18 1898
JAMES H. MCKENNEY
Clerk

Filed Dec. 13, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 113.

THOMAS M. ADAMS AND E. C. MEANS,
ADMINISTRATORS, ETC., OF THOMAS W. MEANS,
Petitioners,

v.

BENJAMIN R. COWEN ET AL., TRUSTEES,
Respondents.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS.

JUDSON HARMON,
JOHN J. GLIDDEN,
H. P. WHITAKER.

JOHN LITTLE,
Of Counsel.

THE OHIO VALLEY PRESS, CINCINNATI.

Supreme Court of the United States.

THOMAS M. ADAMS ET AL., ADMR'S &C. OF THOMAS W. MEANS,
v.
BENJAMIN R. COWEN ET AL., TRUSTEES.

No. 113.

BRIEF FOR COWEN ET AL., TRUSTEES.

NATURE OF THE CASE.

Respondents hold William Means' share under his father's will in trust for his family, which, besides himself, consists of a wife and three daughters, all unmarried and one a minor.

The question is not, as counsel say, whether William's share shall be "a double portion," but whether it shall be any portion at all.

Under the decision of the Circuit Court, from which counsel freely quote, William Means and his family would have been left penniless, in spite of his father's will. Under that of the Circuit Court of Appeals, if it be not disturbed by this court, they will receive exactly the portion expressly given by Item 4 to each of the five legatees, including William.

If the former consequence result from the due enforcement of the testamentary scheme disclosed by the will, the pitifulness of it can make no difference. But if that consequence prove to be hostile to the lifelong policy of the father toward his children, the court will not be astute to defeat a provision of his will intended to prevent such consequence. Certainly not if such naturally expected provision be plain. And even if ingenious counsel be able to conjure up difficulties, the court will surely, if it be fairly possible, resolve all doubts in favor of a construction which makes the father in death as he was in life, fonder of the welfare of his children than of a mere rule of mathematics.

The Administrators have virtually wiped out William's share under Item 4 by charging against it various advances made for him by his father after the date of the will. We claim that this was done in disregard of the plain direction of Item 5, which was as follows:

"Item 5. I have made advances to my said children which are charged to them respectively on my books, and I may make further advances to them respectively, or to some of them, and to my said grandson, which may be charged on my books to their respective accounts. I desire the equal provision herein made for said children, and the provision for said grandson, to be a provision for them respectively, in addition to said advances made, and that may hereafter be made, and that in the division, distribution and settlement of my said estate said advances made, and that may hereafter be made, be treated not as advancements but as gifts not in any manner to be accounted for by my said children and grandson, or any of them, or the issue of any of them."

It is admitted that the advances to the different children were unequal when the will was made. As will appear later they were grossly so, no two being any where near

equal. The purpose was expressed of making further advances to all or, to *some only*, if he should think best. Yet counsel persist in declaring (Brief, 4) that the testator's "dominating purpose was equality," and in referring to rules and authorities which have no bearing when the design of equality is disclaimed.

The fixed purpose to make equal division *under the will*, without regard to advances made during the testator's lifetime, being once ascertained, the extent of inequality which may be figured out in total benefits received from the father living and dead matters not. If the policy of the testator lead in this way to what counsel style sometimes a "double portion," and sometimes a "triple portion," whose concern is it? The trouble with counsel, as with clients, is a stubborn purpose to change the will of Thomas W. Means rather than to fulfill it.

MEANING OF ADVANCES IN ITEM 5.

The use of both the words "advances" and "advancements" shows intelligent discrimination. Each word has a fixed and definite meaning.

> "Advancement" and "advancements" are the terms used in the law dictionaries, and in our statutes, to designate money or property given by a father to his children, as a portion of his estate, and to be taken into account in the final partition or distribution thereof. "Advances" is not the appropriate term for money or property thus furnished. The latter phrase, in legal parlance, has a different and far broader signification. It may characterize a loan or a gift, or money advanced to be repaid conditionally. "Lent and advanced" was the language of the old common count in assumpsit for money loaned or advanced to be repaid. *Chase* v. *Ewing*, 51 Barb. 597, 612.

> See also *Nolan* v. *Bolton*, 25 Ga. 352, 355; *Powder Co.* v. *Burkhardt*, 97 U. S. 110, 117.
>
> But advancement, in its legal acceptation, does not involve the idea of obligation or *future liability to answer*. It is a *pure and irrevocable gift* made by a parent to a child in anticipation of such child's future share of the parent's estate. (Italics ours.) *Yundt's Appeal*, 13 Pa. St. 575, 580.

It is too well settled to require citations that the character of a transaction by which a child receives money or property from a parent is determined by the intention existing at the time. As the Circuit Court of Appeals said (Rec., 614):

> In the nature of things it was not possible for him to have intended by "advances" the same thing as "advancements," for that involves an intention, at the time of supplying the money, that it shall be such.

The comprehensive term "advances" was employed because the restrictive one, "advancements," would not include all the charges against his children and grandchildren, whether debts or gifts, while "*advances*" would.

In *Barker* v. *Comins*, 110 Mass. 477, 488, decided by Judge (now Mr. Justice) Gray, it was held to have been rightly ruled below that the word "advances" used in the will was not restricted to "advancements." The ruling approved (p. 483) referred to benefits conferred by *loans for which notes were given*, which the twelfth clause of the will directed should be considered as so much paid toward the share of the maker. These notes, therefore, were not only "advances," but, until the will took effect, were obligations evidenced by notes.

The foundation of the opposing argument is that by "advances" the testator meant "advancements." This is asserted time and again in the plainest terms. Many items

claimed to be "advancements" are selected from the long accounts with the different children, as they stood at the date of the will.

It may be admitted that the subject matter of some of the items selected, and of others, would have been appropriate for advancements, and that, therefore, slight evidences of intention to make irrevocable gifts by way of advancement might suffice in the absence of opposing circumstances.

The testimony of John, who was his father's agent during the entire period in controversy, and who made most of the entries, is that these accounts cover every transaction of every kind between the father and his children. (Rec., 68, Q. 269; and 70, Q. 294-5.) He was an adverse witness and his testimony is not disputed. He says (Rec., 72) there were hundreds of transactions in the accounts "backwards and forwards," and he "can not recollect how they were all *settled*."

It would be incredible that all the items in those accounts are like those selected. Many of them clearly are not. Yet we might admit that all were, without affecting our case, because it appears in many ways that the necessary element of an advancement was lacking in every instance of a *charge* in the accounts, viz.: the intention to make an "irrevocable gift" free not only from present "obligation," but also from "*future liability to answer*." On the contrary, it will appear that when the children received money or property it was charged to them as debtors, in the ordinary way, in the regular books which contained the records of all the father's many business transactions; that the accounts with them contained numerous *credits* as well as charges; that balances were regularly made and carried forward as in all the other accounts; that they

were, and were treated as, in all respects ordinary current accounts of debit and credit; and that the father as well as the children always considered and acted on them as under the father's control and not beyond it, as it would have been the case if they had been mere records of advancements.

The character of the book in which charges are made, as well as their form, has always been held to be significant of the intention.

In *Bulkeley* v. *Noble*, 2 Pick. 337, 340, the charges were in a little memorandum book and headed "Articles that I let my daughter, Nancy Porter, have." It was held that the intention was to make an advancement.

In *Henry Ashley, Appellant*, etc., 4 Pick. 21, the form of the account is given. It was in the regular book of accounts and marked "Dr." The Chief Justice said:

> In the case before us the charge is of no other kind than would appear if it were intended to debit the same with the several items of the account. Nor is there anything to distinguish it from the other book debts of the deceased. It has been very strongly urged upon us that there is no difference between this case and that of *Bulkeley* v. *Noble*, but we think the difference very apparent. The form of the book and the form of the charge were wholly dissimilar. In a little memorandum book, in which the intestate had entered other memorandums of articles furnished to other children, most clearly as advancements, was an account of articles delivered to his daughter, Nancy Porter, under the head "Articles that I let my daughter, Nancy Porter, have."

The charge was held to be a debt, not an advancement.

While the Massachusetts statute, with which the court deals in the opinion, required that a charge against a child should be made as and for an advancement, this does not

affect the weight of the decision as showing the force and effect of ordinary debtor charges against children in the father's regular books of account.

Weatherhead v. *Field*, 26 Vt. 665, 668, quotes from *Bulkeley* v. *Noble* as follows:

> That no particular form of words is required to show an advancement; an entry on the books of the intestate of property delivered to a child, *made in such a manner as to preclude the idea of a debt*, is evidence that it was intended for an advancement. (Italics ours.)

The court said further:

> The fact that the several heirs are charged with these different sums as "Dr." is a circumstance to show that a debt was intended; *and if the charges had been entered on his book among charges to other persons, where a debt was evidently intended*, it would be difficult to resist the inference that such intention existed in relation to these charges. (Italics ours).

The court held, following *Adams* v. *Adams*, 22 Vt. 64, that the statute of that state, which is substantially the same as in Massachusetts, was "not intended to introduce any new law upon the subject."

There is nothing in the accounts in question to distinguish them from all other business accounts of the testator. The debits and credits were all in due form. The intention clearly was to make and keep obligations against his children, to be dealt with in the future as he should determine, they remaining at all times under his absolute control, a control which he repeatedly exercised.

In *Miller's Appeal*, 40 Pa. St. 51, 60, the court held, by Judge (afterward Mr. Justice) Strong, that

> Questions of advancement are always questions of intention, *and of intention when the property is received*

by the child. If it was a gift then it can not be converted into a debt by any subsequent act or intention of the father. If it was the creation of a debt, then it will continue a debt, notwithstanding any change of the parent's intention, unless some further act be done or agreement entered into to convert it into an advancement. The difficulties in solving such questions are generally found in the evidence from which the intention of the parent is to be gathered. A parent may be liberal to a child, more so than to his other children, without imposing any obligation for future accountability, either to himself or to his estate. It is indeed a common sentiment that equality is equity, but a father is under no legal obligations to make his children equal, *and discrimination in a family is often equitable.* * * * So, too, it is cogent evidence that an advancement is not intended by a father (and in most cases it is conclusive evidence), that he takes from the child a security for the money furnished, or attempts to preserve evidence of it as a debt. *High's Appeal*, 9 Harris 287. If the gift is designed to be irrevocable, there can be no reason for attempting *to retain the power of recalling*, and the attempt shows that *it is not the purpose of the father to give up all possible control over it.* * * * * But before the money can be treated as an advancement there must be affirmative evidence that it was intended to be neither a gift nor the creation of a debt, but a part portion. In some cases this intention is inferred as matter of law from the character of the act. Thus if a parent conveys land to the child from consideration of love and affection only, or pays the purchase money of land conveyed by another to the child, the law presumes it an advancement, though not conclusively. *But where personal chattels or money are delivered to the child, or paid for him, there must be evidence of an intention to make an advancement beyond the unexplained act of delivery or payment. Johnson* v. *Belden*, 20 Conn. 322. Here the father made a charge of the

> sums of money furnished not in a "family book," in which advanced portions are usually entered, *but in his general day book, in which he kept his accounts of debtor and creditor.* The charge was made precisely as it must have been made had he intended to preserve evidence of his son's indebtedness. *The appellant was charged as a debtor, and he was credited for partial repayments.* All this is inconsistent with any intention then existing to make an irrevocable gift. It matters not that sums of money are not properly chargeable in a book of original entries. That would be important in an action between the father and the son; but it is of no consequence when we are seeking only for the intention of the father. We know that money is often thus charged, and though it can not be recovered on such evidence, it is not to be doubted that it is generally intended as a memorandum of a debt, and a means of enforcing payment. In *Ashley's Appeal*, 4 Pick. 21, it was ruled that sums of money, charged by a parent against his child in the usual way of keeping accounts, are not to be treated as advancements under the Massachusetts Statutes. (Italics ours).

"To retain the power of recalling" these accounts and "control over" them, as this distinguished judge puts it, is entirely consistent with the absence of a present purpose on the father's part to exercise the power, unless occasion arise, and with the presence of an expectation that, unless his own wishes or ideas of what is best for his children, or some of them, should lead him to do otherwise, the amounts charged will be left to adjustment by will or otherwise after his death. Until the power and control are in some way surrendered such accounts constitute *debts,* and nothing else.

That the nature of the charges in these accounts to

which the testator referred as "advances" were such as we have stated will appear from the following:

STATEMENT OF FACTS TO DATE OF WILL.

Thomas W. Means was one of the pioneer iron manufacturers in the Hanging Rock region of Ohio. He had strong natural powers of mind, much shrewdness, staunch integrity, and strong love of family. A dominant trait of his character was constant affection for, and great generosity to, each and all of his children, especially in their misfortunes.

"He was a man of strong character and fixed adherence to his plans in life. He was also a man of strong paternal affections, and had been accustomed to extend his assistance and support to all his children by employing his large means on every occasion of their need." (Rec., 616.) No attempt is made to gainsay this striking portraiture of the testator by the Circuit Court of Appeals.

He was prosperous in business. After long retirement in his old age, and notwithstanding the large amounts his children received from him in his lifetime, he left a large estate.

In 1855, when his two oldest sons, John and William, became grown, he had already achieved success, and then inaugurated the policy of using his means to aid his children, which he pursued to the end of his life. That policy was to make advances to them of money or property, as their needs or interests should require, in such a way that he would assist them in making careers for themselves and at the same time protect himself and enable him to do justice to his younger children, if circumstances should at any time so require.

He opened accounts with these two sons, and afterward with his daughters and younger son. These accounts were in his regular ledger, which contained a record of all his many business transactions, posted therein from the journals. In these accounts he invariably charged all money and all stock or property at full value, which he, at any time, advanced to any of his children, thereby reserving the right to require repayment of the money and of the value of the stock or property, if, in his judgment, future events should require this to be done.

John's account begins January 22, 1855; William's February 6, 1855; Mrs. Adams', November 16, 1862; Mrs. Culbertson's, September 18, 1866, and Margaret's, October 24, 1872. (Rec., 323, *et seq.*) The word "advances," which now appears in red ink at the head of some of the accounts and in the index of the ledger, was written by John Means, of his own volition, long after the will was made, some time in 1888, and there is no evidence that the father ever knew of its being there. (Rec., 69 and 70.) The original books, by stipulation (Rec., 1), will be laid before the court.

The first considerable advance was to the eldest son, John, in 1855, of money to enable him to subscribe and pay for $25,000 of stock of the Kentucky I. C. & M. Co. This was John's first business venture. It proved to be a losing one, and in 1862 was known to be such. The father then, following his generous impulses to his children, had John transfer the stock to him, repaid John all he had invested, and assumed the loss. The amounts advanced were charged to John in various items, and *he was credited with the amount when his father repurchased the stock.* See entries March 22, 1860, and June 30, 1862. (Rec., 63 and 324.)

In 1855 the father became a partner in Dugan, Means, Hall & Co., bankers, and in 1860 John purchased an interest in that firm. This venture proved disastrous, and in 1862, when he knew that the stock was worth less than nothing, and its possession a menace, of liability for the entire debts of the company, the father took John's interest off his hands, paying him all he had paid for it, including a premium of $1,000. John retained a dividend of $750 which he had received on the stock when he bought it. (Rec., 88.) The amount of the purchase price was simply *credited* in his account. (Ledger, p. 19).

The balances against John were at all times large before the accounts were opened with any of the other children, except William, having been $61,622.95 in January, 1858; $62,570.06 in August, 1859; and $64,554.06 in January, 1860.

The first balance against William was $3,531.12 in May, 1858. The balance was $3,823.87 in August, 1859, and $2,275.51 in January, 1860.

Large advances were made to both John and William to enable them to purchase stock in Means, Kyle & Co., the charges beginning July 29, 1864. On October 9, 1869, William's stock was bought by his father, *and his account credited with the purchase price*, $99,400, which made the balance $15,841.69 *in William's favor* on that date. (Rec., 331, Ledger, 220.)

At that time the balance against John was $118,993.70; the balance against Mrs. Culbertson $34,081.00; the balance against Mrs. Adams $38,371.04; and the account with Margaret had not yet been opened.

One of the instances where the father came forward to help his children in time of trouble was in the case of Mrs. Adams. She contracted an unfortunate marriage, and a

long and expensive controversy resulted, terminating in a divorce. (See entry in father's handwriting, Journal 1, p. 302.) The very first charges in her account are all of advances made for expenses in this matter, and the books show numerous further ones, all charged against her, extending over a considerable period and amounting to many thousands of dollars. (See Ledger, pp. 16, 287, and Journal 1, *passim.*)

Without now going further into details, with which the books and testimony abound, it can be truly said that the history of the business life of Thomas W. Means, from 1855 to the date of the will, July 20, 1880, shows constant advances to his various children to aid or relieve them, but always made in the manner above described, thereby reserving the right to require their return at any time.

The character and intent of these accounts, therefore, plainly appear upon their face. Why were amounts he owed his children habitually credited in these accounts if the charges recorded "irrevocable gifts" by way of advancement?

Absurdity is involved in the very idea of varying balances of a running account being advancements or any sort of gifts. Realizing this, counsel, in their brief below, argued that the items of advancements must be selected from the other items, "allowing the *res gestae* of each item charged to determine its character." It is not possible, however, in this way to make up the amounts set up in the answer, or to come anywhere near equalizing the totals of the advances.

But if confirmation be needed of the evidence of the accounts themselves, it is afforded in abundance by other circumstances.

1. At the head of John's account (Ledger, 19, Rec.,

323) appears, in the father's handwriting, this memorandum:

"This act. and the acts. of William Means and Mary Ann Adams are not to be charged with interest when final settlement is made, or at any time. Thomas W. Means."

There is no date; but as the account of Mrs. Adams was not opened until November 16, 1862, it was plainly some time after that date. There is no such memorandum on William's account (Ledger, 40), but above his account, after it was carried to Ledger, p. 220, the first date thereon being September 17, 1860, the following appears:

"No interest shall be charged on this account on final settlement, or at any other time. Thomas W. Means."

The same is written and signed above Mrs. Culbertson's account (Ledger, 280), at the top of Margaret's account (Ledger, p. 230), the first item of which is October 24, 1872, and is repeated at the top of John's account when transferred to page 281, where the first entry is December 31, 1866.

The testimony of one of the bookkeepers shows that some of these directions were written before and others after July, 1869. (Rec., 546, 548).

The dates when these releases of interest were written, being shortly after the close of the Civil War, when the father's profits from his iron and other interests had been enormous, show that he thought the time had come when he might prudently release his claims against his several children *for interest* on the advances he had made to them. Until then he had certainly intended that they should bear interest. After then he as certainly regarded the principal as under his control.

2. On December 9, 1873, the father determined to make a distribution of a part of his estate among his

children. He accordingly made an entry (Journal 2, p. 4, Rec., 71) charging his own account with $400,000, and *crediting* that of each of his five children with $80,000, adding, "Amount to reduce the balances against these accounts, having been given to my children. (Signed) Thomas W. Means." Accordingly on the same day the account of each was *credited* with $80,000. This credit reduced the balance of the account against John, on that date, to $69,417.96; the balance against William to $21,207.54; the balance against Mrs. Adams to $1,007.78; made the balance *in favor* of Mrs. Culbertson $5,000, and the balance *in favor* of Margaret $6,580. Counsel say (Brief, p. 39) after quoting the above memorandum, "This seems to be a clear statement of the testator that the accounts represented gifts!" This meaning is extracted by referring the clause "having been given to my children" to "accounts" instead of to "amount." The manifest absurdity of this is emphasized by the fact that in two cases the gift exceeded the debit balances of the account.

If the amounts charged in these various accounts were in the nature of advancements, the $80,000 given to each child would necessarily have been *charged* also. The fact that it was *credited* shows conclusively that it was a gift and was made to offset and cancel the *charges* in the account, *pro tanto* as to some of the children, and entirely, leaving a balance in their favor, as to others. He thereby exercised his power to recall the advances charged. They were repaid to him by this gift. He paid nothing, but simply credited. What he gave was merely what they owed him on these accounts. What he distributed was these *assets* entered and carried as such on his books.

3. On March 22, 1871, the father opened an account

with Thomas W. Means, Jr., a son who died unmarried before the will was made, charging him on that date with $50,000, advanced to enable him to buy Means, Kyle & Co. stock. At the top of the debit side of this account there is written in the father's handwriting, "This is not to be paid." This direction counsel say "it is fair to assume was intended by him as the equivalent of the superscription over the other accounts," viz.: that no interest was to be charged on them! The reasons are obvious why he may well have chosen to treat his youngest son differently. When he came of age, the use alone of the advances made to the other children long before amounted to more than the entire sum advanced Thomas. John admitted that this was a source of great inequality. Computation shows that it would make a difference in John's favor alone, as against William, of more than $141,000 (Rec., 173). The difference with Thomas would of course be still greater. But reason or not, the difference between the direction written above Thomas' account and those written above the others is not to be escaped.

4. Pursuing his fixed policy of aiding his children, the father entered into business with his son-in-law, Culbertson, in the Princess and Buena Vista Furnaces. The venture proved disastrous and was closed up between 1875 and 1880 with a loss of $168,989.38 (Ledger, 333). The father did not charge any part of this to his daughter, though he had gone into the business to aid her husband, who managed it, and within ten days before the execution of the will, wrote out and gave to Culbertson the following release:

"Whereas, in the settlement of the partnership heretofore existing between Thomas W. Means, W. W. Culbertson and K. R. Culbertson, deceased, by a suit in the Boyd

Criminal Court, there appears to be a balance in favor of Thomas W. Means against the said partnership. Now in consideration of one dollar to me in hand, paid by W. W. Culbertson, I, Thomas W. Means, do hereby release and acquit W. W. Culbertson of all liabilities to me for said balance, and this shall be his receipt in full therefor. Witness my hand this 10th day of July, 1880. Thomas W. Means."

This paper was given to Culbertson without his solicitation. (Rec., 208.) By the will, which was then in preparation or contemplation (Brief, p. 42), all obligations on the part of the children arising out of advances to them were to be wiped out. But the will would not release the son-in-law from this undoubted debt. Hence this separate forgiveness.

It will be noted that the entire loss was incurred in an effort to establish Culbertson in business.

Why one-fourth the price of the furnace property used in this business was charged to Mrs. Culbertson years after the purchase, does not appear. It is made by John, in his own handwriting. It was not chargeable to her as an *advancement*, which counsel claim it was. (Brief, p. 49.) *Stayner* v. *Bower*, 42, O. S. 314.

This care to release his son-in-law from a debt so shortly before the will as to be virtually a part of it throws strong light on the testator's motives and intention.

5. If it be suggested that the crediting of amounts at which unfortunate ventures of the children were taken off their hands by the father was merely a matter of bookkeeping—a mode of canceling the charges for the original advances—this, if true, would not be inconsistent with our position. It would still show that the advances, when made, lacked the element of irrevocable gift necessary

to advancements, but that on the contrary they remained under the father's control to be dealt with as he might choose.

But these are exceptions. There are many instances where the credits had no relation to any of the charges. We will mention some of them.

John bought the stock in Dugan, Means, Hall & Co.'s bank, heretofore mentioned, with his own money, from a stranger, so that there was no charge to him. (See John Means, Rec., 88, Q. 551 *et seq.*) When the firm became deeply involved so that the stock was not only a loss but a peril, the father bought it from John, paying him what he had paid for it, including a premium of $1,000, and instead of paying him *credited the amount to his account.* Thereby $6,000 of the advances charged were repaid.

Again, take the entries after the death of Thomas W. Means, Jr. Counsel use part of these (Brief, pp. 46-7) but omit the others without even referring to them, though they immediately follow those used.

T. W., Jr., had been charged with amounts advanced by his father to enable him to buy certain stock. It was over the debit side of this account that the direction was written "This is not to be paid." Thomas having died unmarried and intestate his affairs were evidently settled without an administrator.

This stock, though Thomas', was divided among the surviving children. Just why it was charged to them in their accounts does not appear, but as it really came from the father they seem to have made no objection.

But by the succeeding entries (Journal 1, p. 398) a *credit* of $6,310.55 was made to each surviving child and after-

ward carried to the ledger accounts. Below the journal entry is the following:

"The above entry is made to divide the amount I owe to T. W. Means, Jr., deceased, on account of dividends on his Means, Kyle & Co. stock and balance due him in Second National Bank received by me, equally among his heirs."

As the father had owed this to Thomas he of course owed it to his heirs. If their accounts were mere records of advancements why should he pay this debt by credits in them?

Again, take the $23,400, credited to John Dec. 9, 1873 for amounts paid Mrs. Adams and Margaret (Journal 2, p. 4, Ledger, 281, 287, 320.) Counsel use this entry (Brief, p. 39) to show "that John paid each of his sisters $11,700 out of his own money toward equalizing them with him," but they seem not to see its real significance.

As counsel say (id.) "John was $89,423.58 ahead of Mrs. Adams and $100,855.68 ahead of Margaret." On what? On an account of *advancements*, they contend—irrevocable gifts never to be paid and to be accounted for only in the settlement of the estate. The father requires John to pay each of his sisters a large amount, *out of his own money.*" He does so. He is *credited* for it in that very account and the sisters *charged* in theirs. What was this but the collecting back by the father from John of $23,400, of the advances made to him and advancing half of it to each of the two sisters?

John gives an instance where the father repaid a loan from the son by a simple credit on that son's account (Rec., 113.):

Q. 1091. You say on page 34 in your testimony that at the time you were paying for your subscriptions in the Low Moor Iron Company, your father then paid you back certain sums that you had loaned to him. Now, I would like to have you state a little more specifically, Mr. Means, when you loaned your father money, and what evidence there was of any loan of money from you to your father?

A. These books will show it. August 18th, 1870, I let him have $6,000. September 2d, 1870, $6,000.

Q. 1092. Were not those credited to you in the book?

A. I think so.

Q. 1093. In your account?

A. I think so.

Q. 1094. And appear as a credit that reduces the charges against you?

A. Yes, sir.

The foregoing is part of the evidence on which the Court of Appeals said (Rec., p. 617) "There is no doubt that Thomas W. Means was accustomed to enter charges in his book as denoting an indebtedness from his children to himself."

The general nature of these accounts is not affected by such an entry as that mentioned (Brief, 49, 50) whereby John was charged with money received from his father for investment and credited shortly afterward when he expended it. As this was plainly neither a gift nor an advance and the entries are all in John's handwriting (Journal 2, p. 118, Ledger, p. 380), it is for John to explain why he so made them, the date being shortly after the will whose provisions he knew. It is not true that either our argument or the decision of the Court of Appeals would have

resulted in giving John this money if the father had died before the offsetting credits had been entered, if the above facts had clearly appeared.

The record shows that by the aid supplied by the father the children all prospered and became rich. Suppose matters had gone otherwise with the father and he had required the return of these advances or some of them. In view of the way these accounts were kept and of the facts above set forth showing their undoubted character and treatment, by them as well as by him, as current business accounts subject to his absolute control, would the court hesitate to enforce the right he had reserved to recall them at will?

Surely it would not. Obligations, then, they surely were and nothing else, until he in some way released them. And they were none the less obligations because occasions did not arise for their enforcement, except by discharging them in part from time to time by credits.

As the *father's* intention at the time of the advances must determine their character, letters of the children to each other at any time, especially after the date of the will, like that of John to William, quoted by counsel (Brief, p. 43), are wholly incompetent. But even if they were not, the expressions in them are plainly to be accounted for by the fact that by the will, which had been shown to the children, all advances were to be forgiven. There being then little likelihood of any change in the situation of the father which might require him to exercise his control over the advances by recalling them, the children would naturally regard and mention them as already being what they would, in the course of nature, soon become, viz.: gifts or distributions.

At the date of the will the accounts showed the following debtor balances:

John	$79,214.36
William	58,409.54
Mrs. Adams	51,207.48
Margaret	39,120.78
Mrs. Culbertson	29,609.82

The balance due from John was more than three times that due from Mrs. C., more than twice that due from Margaret, over one-half more than that due from Mrs. A., and over one-third more than that due from William.

The figures given in the opposing brief (p. 2) are found by adding to each of these balances, with some errors in calculation, the $80,000, credited in each nearly seven years before. The same is done in the answer. (Rec., 22.)

In view of these differences then existing, why talk of a "dominant idea of equality?" If the testator had died within a few months after he made the will, there would have been no escape from the gross inequalities above set forth. The record plainly shows that his advances had been unequal from the beginning. His conduct was always governed by the respective needs or interests of his children, and by them only. He never stopped to figure their balances before going to their aid.

There is no suggestion of any purpose to abandon that life-long policy. The contrary intention is clearly written in the will. "I have made advances to my children;" "I may make further advances to them respectively, *or to some of them;*" "I desire the equal provision herein made to be a provision for them respectively *in addition* to said advances made and that *may hereafter be made*."

The intention of equality in what the children should receive at the testator's death is plain. The intention of actual or possible inequality in the advances is equally plain.

If, as counsel contend, the "advances" referred to in Item 5 meant only "advancements" made and to be made, the item was wholly useless, because advancements relate only to cases of intestacy, and whatever had been or might afterward be given in that way would not, under a will, be chargeable against the legacies. *Needles* v. *Needles*, 7 O. S. 432, 435.

Counsel refer to Sec. 4169 Ohio Statutes (Brief, 40) without mentioning the fact that it applies in terms only to property "given by any *intestate*," &c.

To give this item any effect at all, therefore, it must be held to refer to money and property advanced so as to create an obligation, because debts, but for Item 5, would be collectable or be set off against the legacies.

"Advances" is used alike with reference to both past and future. It must be taken, therefore, to mean the same as to each. This shows, especially in connection with the fact that previous advances had created debts, that the testator was looking forward not to gifts he might afterward make, but to what would be and remain *debts* but for the clause he was writing. But even if we could take "advances" to mean one thing as to the past, and another as to the future, viz.: anticipation of legacy, we reach an absurdity. Future gifts would reduce the legacies only in case that should be the testator's intention at the time of making the gifts; and we should have him solemnly providing in advance that his future intention should be utterly ineffectual.

The testator could at any time recall future advances creating debts. He could not recall future gifts whether outright or on account of legacies. His language becomes clear and consistent, as to past and future alike, if we consider him as expecting to continue in the future what he

had done in the past—hold against his children obligations for advances to them.

It may fairly be said that counsel in effect ignore Item 5 entirely, seeming unconscious of the self-contradiction in the position taken (Brief, p. 5, top) that its intention was "to convert into a gift" what he had advanced "by way of gift."

The "testator's general scheme" (*Given* v. *Hilton*, 95 U. S. 591, 594; *Weatherhead's Lessees* v. *Barkerville*, 11 How. 329, 358) disclosed by the will was just what we should naturally expect from him. His interest in all his children and his pride in the family name, which will strikingly appear hereafter, would forbid the leaving of any of his family unprovided for at his death, if either fault or misfortune should require advances which would consume their share of the estate to be divided under his will. What that scheme was can not be better described than it was done by the Circuit Court of Appeals. (Rec., 614):

> The language could hardly have been made plainer to indicate that the leading purpose of the testator was that the property which he should leave at his death, irrespective of what he might have advanced to them during his life, should be divided among the five persons named. What they should have received from him, by way of loan, no longer was to be treated as such, but was to be forgiven. He uses the word "advances" in the sense of "furnishing," "supplying," in advance of the final distribution of his will. It is absurd to suppose that he used the word as equivalent to the technical word "advancements," for, in the face of the disposition to be made of his property at his death, he must have known that, if in the meantime, he should bestow property upon them, whether by way of gift or loan, it would not be an

"advancement," as that word is used in legal phraseology. In the nature of things, it was not possible for him to have intended by "advances" the same thing as "advancements," for that involves an intention at the time of supplying the money, that it shall be such. Besides, he uses that term indiscriminately to apply to what he had given and charged to his children before the making of the will and to what he might thereafter charge them. The legacies of the equal provision were to be "in addition" to such advances, and how could the testator be supposed to have used the word "advances" in its technical sense, which involves a satisfaction or diminution of the legacy *pro tanto*, when he expressly declared that the legacies should be in addition to them? The testator intended that they should not be eaten away by what he should be moved to do for his children during his life. The will becomes operative upon the death of the testator. What this will then meant was this, whatever the testator has helped his legatees to before this time, when distribution has finally come, though then a debt, is now forgiven. It "is not in any manner to be accounted for." The equal distribution now to be made of what remains is "in addition to said advances."

SUBSEQUENT EVENTS NOT ADMISSIBLE TO SHOW INTENTION OF WILL.

The natural meaning of item 5, that the legacies under Item 4 "should not be eaten away by what he should be moved to do for his children during his life," emphasized, as we have shown, by the character and history of the testator down to the date of the will, can not be affected by anything which happened afterward.

In *Morris* v. *Sickly*, 133 N. Y. 456, 459, in which Judge (now Mr. Justice) Peckham concurred, the court said:

> While a will is in some sense ambulatory as to the objects and subjects with which it deals, yet it is not ambulatory as to the meaning of the language used by the testator and the intention and purpose which control the disposition of his property. That intention and purpose must be found to exist at the time of the execution of the will, and can not be varied or changed by any after-occurring events.

In *Barber* v. *Pittsburg, &c., R. Co.*, 166 U. S. 83, 109, the court said, by Mr. Justice Gray:

> To allow the legal construction of the terms of a will, executed and attested as required by law, to be affected by testimony to the testator's state of health at the time of publishing his will, or to the length of his life afterward, would be open in the highest degree to the confusion and uncertainty resulting from permitting the meaning of written instruments to be altered by parol evidence.

In *Painter* v. *Painter*, 18 O. 247, 263, the court said:

> The testator may undertake by a writing, which clearly expresses his intention, to explain some statement in his will, or to alter some of its provisions; but unless two witnesses have put their names upon the writing, and it is otherwise executed like a will, it can not be received in evidence. Is it to be supposed, then, that a loose declaration, or even clearly expressed wishes of the testator, not certified in the manner pointed out, can be received in evidence or be held to revoke a will or control its provisions?

In that case complainant was not permitted to prove that a statement in the will that he had received an advancement was a mistake, or that the testator had afterward intended to correct the mistake, though the dominant purpose, frequently expressed, was absolute equality among the testator's children.

That, at John's instance, what counsel call an equalizing

of the accounts of the four children was afterward made, leaving the grandchild some $70,000 behind, is therefore entirely immaterial.

But there was no equalizing, in fact, of benefits received from the father. Among other instances, John received a one-tenth interest in the Big Sandy Packet Co., for which he was charged only $1,200, and for which he received $18,000 of stock worth par, while William received $6,300 of the same stock, and was charged $6,300 for it. (Rec., 64, 80, 81.) Observe here also the enormous differences in benefits arising from the waiver of interest which are mentioned elsewhere.

We call attention here to the statement (Brief, 44) that "Mrs. Adams received $39,632.55 from her father on September 22, 1881," etc. Counsel do not quote the entries from the journal, as in many other instances, though they refer to it. These entries show that all of the $39,732.55, except $2,700, consisted of checks to her son, beginning February 1, 1881, and all before the time of the charges. The record shows (p. 469) that this grandson, about that time, went to Montana to engage in business.

Equally irrelevant are many other matters subsequent to the will, to which counsel refer, such as the alleged fact that the advancement accounts were closed when it is said that they were equalized in 1884. They were no more closed then than they had been every time they were balanced. Entries were, in fact, made in them afterward, as they show on their face. But if they had been closed, this would and could show no change of purpose on the part of the father, expressed in his will, to make further advances thereafter, if the needs of any of his children should require them. His large heart and purse remained open whether the accounts were closed or not.

The actual equalizing of the advances after the will was made would imply no abandonment of the design expressed in the will to make further advances to such of his children as required them, and thereby unequalize them again, even if any changed purpose on the part of the testator could be effected in any way except by altering the will.

The Court of Appeals said (Rec., 314-5):

> We are not prepared to say that under no circumstances could a debt from a legatee to the testator be created as an obligation independent of the absolution accorded by the will. Indeed, we think otherwise.

We do not admit the proposition that advances could be made to a child which would escape the operation of Item 5 if the will was left unchanged.

See *Needles* v. *Needles*, 7 O. S., 445.
Crane v. *Doty*, 1 O. S., 279.
Painter v. *Painter*, *supra*.
Kent v. *Mahaffey*, 10 O. S., 204.

Gifts might be made, of course, after the will, in satisfaction of the legacies. Advances which were not gifts but created obligations could not be taken out of the operation of Item 5 without permitting the scope and effect of the will to be changed otherwise than under the safeguards required by law.

We think the only question is one of description. If the subsequent transactions were advances they necessarily come under the operation of Item 5, as the will was not changed. And whether they were advances or not depends on their character, and not on the presence or absence of intention with respect to the effect of the will on them.

It is not necessary to inquire whether debts not in

the nature of advances would have been forgiven by the will, because it clearly appears that the debts with which we have to deal were strictly advances in the narrowest sense—like most, at least, of the advances made before the will, viz., money furnished so as to create an obligation to repay it if required, but supplied on paternal and not on commercial grounds.

It is the purpose for which the money was furnished which determines whether these transactions were advances or not. This distinction is, we think, what the Court of Appeals had in mind in the passage just quoted. But then the test would not be the intention of the testator with respect to the will, as it is in cases of ademption.

But let us take the case where the Court of Appeals put it (Rec., 615):

> But we think, also, that having regard to the manifest purpose of the testator when this will was made, to hold a free hand to help his children during his life as their necessities might require, and then at the end to divide what remained of his property equally among them, the court ought to require clear proof of some distinct purpose on the part of the testator during the transactions when he furnished the helping means which is supposed to have created the debt, to put that debt outside of the pale of the forgiveness which he had written in his will; and it must have been his purpose, and not that of some other. Even an expectation on the part of the legatee that the moneys paid for his benefit would in the end come out of his share of the estate would not change the situation unless the testator himself had a corresponding intent. He was the master of his fortune, and if he did not lend his money with the intent that if not repaid in his lifetime it should be repaid to his executors, then it would fall under the provisions of this

> will. There is not to be found in this record any such clear proof of the purpose of the testator to establish by the furnishing of the financial help, which he did, to his son, to establish an independent obligation on the son's part, which if not paid during his life, should not be condoned by the provision in his will.

Counsel say (Brief, 30) that the court said:

> That the purpose to create a debt as distinguished from a gift must have been the "testator's purpose, and not that of another."

The court was not speaking of gifts at all, but of debts which would survive the will as against debts which would not.

THE AMOUNTS THE PETITIONERS HAVE CHARGED AGAINST WILLIAM'S SHARE WERE ADVANCES AND BECAME GIFTS BY THE WILL.

In February, 1888, the bank in Cincinnati of which William was president failed, involving him not only in financial ruin but also in danger of prosecution in the Federal Court. He had been guilty of no intentional wrong, but was charged with irregularities in matters concerning which the banking laws are properly strict and severe. Conviction would mean infamous punishment.

William had won honors and reflected credit on the family name. He had been mayor of Cincinnati and often mentioned in connection with other offices, such as that of governor of Ohio. The bank of which he was president had stood high in the financial world. In all these things his father and the entire family had naturally taken great pride. William's threatened disgrace would be a stain upon the name of Means.

As soon as they learned from the newspapers of the bank's failure, the father and John held a conference, as a result of which John went to Cincinnati to investigate the situation (Rec., 94). He remained two days, saw William and others (Rec., 98), and on his return reported:

A. I told him of William's debt to the bank—individual debt—and what it would probably amount to, and that friends here advised that it was for William's interest that that debt—individual debt—should be paid. I told him that the securities which William had turned over to the bank as security on the debt would, some of them, probably be sacrificed at a sale here—that I thought we had better pay the debt.

Q. What did he say?

A. He said that he was satisfied to do whatever I thought was best. * * * * I can not repeat the conversation between us any more than give the general result of it." (Rec., 96.)

John testified five years after the event. His letters at the time show that what the father said was "to do as I think *best for you*." (William.) (See letter February 23, 1888, quoted below.)

Two days later, February 15, John returned to Cincinnati to carry out this direction of the father. There can be no reasonable doubt, in the minds of men accustomed to judge of human conduct, that the father's intention was to treat William as he had often treated John when he had met with losses, as he had treated Culbertson, and as he had always shown himself ready and willing to treat any and all his children in need or misfortune.

John had found that William was indebted to the bank on various notes, as maker and endorser, to the amount of $125,911.74, including interest. The bank held securities

belonging to William of the face value of $182,350 (Rec., 93), and of a then estimated saleable value of $146,236. (Rec., 387.) If these securities were not taken up a forced sale would result in a great sacrifice; and if William's debt to the bank was left unpaid, it would reflect seriously upon him. It was believed, too, that if the debt was promptly paid in full, criminal proceedings would be avoided. John, therefore, acting under his father's direction, "to do what was best for William," on the day he arrived paid the notes held by the bank and took up the collaterals.

It is not claimed that there was then any agreement or understanding whatever as to William's interest in his father's estate. *This was not then thought of or mentioned by any one.* The only purpose was the *prompt relief of William from embarrassment and danger.* John returned to Ashland the next day, February 16th, taking with him the notes he had paid and the collaterals, on some of which $28,800 was realized on February 17 and 20. (John's letter February 21, Rec., 108.)

William remained in Cincinnati to meet the situation as best he might.

There had been no suggestion whatever of a note, due bill, or even a receipt down to this time.

The same day, February 16, (Rec., 216) John wrote William from Ashland: " * * * Have been busy this afternoon making entries of my transactions yesterday, examining, sorting, and listing notes and collaterals. My payments yesterday for you amounted to $125,911.74. *I think you had better send me a note at one day in father's favor for the amount. Had a talk with E. F. Williams on my way up, and when I explained to him he agreed with me that this is best to close up the matter at present. He may*

write you. Will [illegible] to send you $1,000 to-morrow or next day."

E. F. Williams, who was the personal friend and attorney of William was much concerned about the effect upon William's private fortune of the claims of other creditors, and especially from threatened suits by stockholders and others for damages resulting from William's connection with the alleged irregularities in the management of the bank. He testifies (Rec., 216) that he agreed with John to have William sign a note for the amount paid, "so as to protect his interest in the estate against the attack of creditors."

Q. 117. Was anything said at that time as to whose benefit it would be for that it was protected?

A. William Means.

Q. 118. Was anything said at that time as to the matter of enforcing that claim as against anybody else but the creditors, as against William Means himself?

A. The claim was not to be enforced against William Means. The note was given for his protection alone, etc. (Rec., 217.)

John's letter, of February 16th, was not answered. February 20 (Rec., 108) John wrote William enclosing "forms which explain themselves," which he asked William to "copy, sign and return to me," &c. He adds, "I also think it best for you to have as herewith indicated *fearing suits be brought against you and other directors which may give you trouble as it now stands.*" This is clear confirmation of Williams.

What the forms were, which John sent, appears from William's answer, February 21 (Rec., 115), in which he enclosed due bill dated back to February 15 for the $125,911.74 (Rec., 163), receipts for $700, $1,200 and

$1,000, and a power of attorney to sell the securities pledged at the bank "to secure the payment of my notes and of notes endorsed by me, *which notes you have thus paid* to the amount of $125,911.74"—"*all as requested by you.* I fully agree with your action in the premises *as the best preparation for the civil suits which are likely to follow.*"

William did not send his note on receipt of John's letter of 16th, in which he did not explain the reason for asking it but merely said that Williams and he had agreed about it and that Williams would probably write. In view of these letters written at the time, it appears to us useless to compare the recollections of John and Williams after so many years.

As soon as John explained the purpose of the note in his letter of 20th, William promptly sent it, acquiescing in the reasons. That those reasons related to claims of creditors is plain from one further fact alone, viz.: When the note was given, February 22nd, *it was for the full amount paid by John*, $125,911.74, although William was then entitled to credit for $28,800.

John had said in his letter of February 20th: "Father is growing more feeble and almost blind. He has seen his children and others for the last time, unless an operation restores his sight again."

To this William replied in the above letter, after expressing his regret at his father's condition:

"Every word you write on the subject only adds to the oppression I feel in connection with my own calamities, which are more crushing than I can express, and cause me to look with envy on any one who is ready to lay down his life for the life to come. There is no language to express my sense of my condition, which I could even bear

were not others called upon to share the burdens. I do not like to be alone, yet it would appear as 'twere better for all who are near and dear to me that my troubled existence should end in absolute isolation."

John also wrote William, February 21st (Rec., 107), and the two letters crossed. John repeated the mention of the note, specified the securities already sold and asked for a request from William to his father for the latter to protect William's two notes for $6,000 and $9,000, at the Ashland Bank, with authority to sell or collect the securities therewith. The first note fell due February 21st and was then paid.

These William sent accordingly, February 23 (Rec., 116), showing that the securities were 220 shares of Metropolitan Bank stock; $10,543.64 was realized on this stock. (Rec., 361.)

On the same day (Rec., 361) John answered William's of the 21st, from which we have quoted. He says the father "keeps cheerful and contented, walks out every day if good weather, some one taking his hand as he walks. *Have explained to him my action in your affairs, amounts paid, how obtained, the advantage of saving securities pledged from being sacrificed,* &c., &c. He understands all, but soon forgets details, so that I have to explain again when next I see him, *and always ends by telling me to do as I think best for you.* I wrote you not long since as to father's prize in Maggie as a daughter, and assure you that you have in her a sister to be proud of as well. Many here have kind words to speak for you—more than I can mention. With the many warm and able friends who have shown themselves in the past few days, don't be discouraged, but *cheer up for the sake of your family. I don't think they feel it a burden to share your trouble. It is not that we*

do for ourselves, but what we do for others will give us most pleasure to think of. Keep me advised of your needs for money and I will try to keep you from trouble on that account. Just now the amount borrowed engages my attention, but I hope soon to have under my control. Yesterday I paid a hundred thousand, so you see I am not in a hole. All well at home." This $100,000 was the repayment of loans made from Sinton and Hanna to raise the $125,911.74. (Rec., 359).

John's letter, February 24th (Rec., 362), recites the securities William had handed him in addition to those "lifted" at the bank February 15th. They were $53,050, face value. He adds: "*I think it may be prudent and safer* to send me authority to dispose of these like that sent in regard to the others. *After the storm blows over we can arrange about them.*"

Counsel say (Brief, p. 20), quoting John's testimony, that "the storm" was the threatened criminal proceedings, but as these could have had no connection with the securities, and had not yet been referred to in any way, the storm was manifestly the threats of civil suits which had been mentioned in the talk with Williams and in various letters.

John's letter shows he left next day, 25th, for New York. He returned March 3, and March 5 wrote William (Rec., 362). He inquires about another note at the Ashland Bank for $1,200, endorsed by William, which William had never mentioned. His letter and William's reply show John had paid $1,000 more to one of the attorneys who was acting for William. William sent a receipt for it. His letter was written from Yellow Springs, where he had taken refuge for a time from his troubles and consequent prostration.

It will be noted that down to this time *there was no word or suggestion as to the form or character of the transactions, except about taking notes as a precaution against suits by creditors* and receipts for the smaller amounts paid out.

March 9th (Rec., 363), in a letter explaining the entries he had made and the items, John says "I have opened current accounts to keep separate from accounts of advancements to us. It will be well for you to preserve this letter, as in the event of anything happening to me it may be needed and used as evidence *for the benefit of yourself and family.* I would like to know whether what I have done in the matter is satisfactory to you, or have you suggestion to make as to changes in the shape of accounts, &c., &c."

John also writes, "Let me know of your needs for money that I may *keep you supplied.*"

In reply William writes, March 15th (Rec., 116), that "not being well and a good deal disturbed by recent events, am not very capable for business," etc. "I can not now make you any suggestions as to your manner of keeping accounts, which I doubt not are in every way as they should be."

The various letters following relate simply to details of the business of taking up William's notes and collaterals, John's interviews with the attorneys, &c. They show that John was pursuing the father's direction to "do what was best for William" in his trouble, and was taking the initiative himself. Thus March 21st, (Rec., 365) he writes of hearing, while in Cincinnati (William was still laid up at Yellow Springs) of another note at Circleville which he had asked to have held, and asks "Have you any other notes out? If so advise me what, to whom, &c., &c. It

may be *best for you* that I pay or buy them up to secure the collaterals."

Some of the letters refer to attempts to secure political influence to prevent prosecution. See letters of April 16th and May 14th. (Rec., 135, 192.)

William's letter, July 12th (Rec. 130), first mentions the Labrot trust which will figure later. He wrote:

"Now, John, this will only add to your burdens, already too great, but I have no one else to go to, and excepting for the trouble it is to you would wish no other confidant. When the bank troubles came on us, almost all this trust was swamped with everything else. I had intended holding everything I had, and everything that might ever come to me as sacred to this trust, but felt compelled to surrender with other directors such things as we handed to the examiner in order, if possible, to stave off the coming calamity. When the crisis came, my only thought of help in this was through you and father, *but had not collected myself sufficiently to act, when you suddenly paid in the* $126,000 *and frightened me still further as to this trust.* Since then I have endured constant agony, the matter never being absent from my thought during the day, and in my dreams and waking moments at night.

* * * * * * * * *

"*I rely so much on your sense and heart, that I find some relief in coming to you with this great trouble, in which you seem to be almost a parent as well as brother.* And you can not imagine the sense of relief I should experience if I could feel that this additional weight will be lifted off me. *I have nothing to offer you in return but gratitude and brotherly love. I have nothing to tempt you with, but there may be in the future something I can do for you or yours that can not now be conjectured, and this is my hope.* Words are inade-

quate to express my feelings, but I can never forget *your labor of love.*"

July 17th, (Rec., 119) William writes:

"They would not expect me to attend to details until in a proper condition of body and mind, which can be managed. I am as well as could be expected, though held down by mental troubles, and wondering if the day will ever break for me again."

July 18th, (Rec., 368) John writes he will make a remittance to the Labrot heirs and, mentioning efforts to sell some of William's mining stocks, through Col. R. S. Bright, says:

"After this has been done can better help you in the Labrot matter, and it is probable we shall be obliged to put in something on the trustee debt of ($110,000) at the M. N. Bank as action of McConville and Burnet may hinge upon it."

He adds, still speaking of the Labrot matter:

"You can depend on Mary, Maggie and myself in money matters, but father's affairs I must handle with the care of an executor, and probably before no long time as one under a Probate Court. Am glad you have written as to the amount of the Labrot trust, since it shows me what we must be prepared for, and if not to be paid in a short time with aid your sisters can give, and I know both are willing, we can settle it up and get it off our hands. I think now it is best to get all your matters settled up as quickly as may be done."

October 1st (Rec., 385) John writes:

"*Stockholders and others interested in the M. N. B. have an idea that you are to inherit a great estate some day and are urging the agent, McConville, to take judgment against you, on which it is hoped to squeeze us now or realize in*

future. I find that it is necessary that you resign the Labrot trust, and another be appointed with whom I must in some way arrange for the paying off the trust a large amount of money. Unless you come here with Maggie, I can not do anything, and money paid is lost as far as doing *you any good or us any good* in this matter. We are ignorant as to the terms and condition of the trust, as to what you owe or what you have belonging to it. Don't even know to what court to look to find it, nor who are your securities, and it is simply impossible for us to act for any benefit. I notice in yesterday's *Cincinnati Post* 'Means bonds forfeited for lack of renewal, &c., &c.' I wire C. M. H. to-day for information. If you delay and crowd too much work into a few days, it may be too late to do any good, or at an increased expense which may be beyond my ability to provide for."

October 4th (Rec., 385) John writes:

"My references to trust last week meant the Labrot trust, as I shall have to settle that either through Maggie or Tom Adams. You should tell Maggie all about it."

Counsel have devoted some thirty pages of their brief to establishing a proposition we have never denied but have always expressly admitted, viz.: that the payments made on William's account in this trouble created *debts* from him to his father. As they plainly were not intended as gifts, either outright or by way of advancement, debts necessarily resulted. How the intention not to make gifts of any kind appears is quite immaterial. Merely charging them in a business account sufficed, as above shown with respect to previous advances, and the father could have required payment at any time if he chose. The taking of notes as an after-thought, no matter what the

motive, could not change the character of the transactions. If the amounts had been intended as gifts when paid, the subsequent notes would have been wholly without consideration. If they were not intended as gifts the subsequent notes merely expressed obligations already implied.

What counsel must show is not that these payments created *debts*, but that those debts did not arise from *advances* and did not come within the absolution written in the will.

Now advances, as the Court of Appeals held, include whatever was furnished or supplied William; and the fact that they were so made as to result in debts did not make them any the less advances. "The giving of the notes would not of itself alter the character of the advances." (Rec., 617.) "If they were intended as loans for the time being, as no doubt they were, there was nothing out of the way in taking notes for them. But in the original and main transaction even this was not done" (id.).

As before shown, "advances" is a term broad enough to cover all sorts of obligations arising from the furnishing or supplying of money or property, including loans. Thus one makes advances on an unperformed contract, on a promised shipment, on a note or security, in the case of a stranger, because for some business reason he has faith in the stranger doing the thing expected. A father may have a purely commercial transaction with a child, as where he sells him property for full value and takes his obligation for the price. But let us assume, for the sake of the argument, the narrowest meaning of "advances"—benefits which a father is moved by affection to bestow on a child, a family, as opposed to a commercial, transaction. The father has faith in his son's future. Strangers may have

faith in it, too, but they will not advance money or property on it as the father does. If he charge it in his regular accounts, or take a promise in the form of a note or otherwise, it is none the less an advance. This simply shows an intention to retain "power" or "control" over it. He may at the time and always entertain the expectation not to require payment but to deal with the matter in the division of his estate by will, or by leaving it to the law without a will. It is not the present but the future which the father regards, and the form in which his power and control are put is of no consequence. Notes at one day for large amounts from an insolvent son do not differ from debtor charges of the same amounts. Both are evidences of debt. In both the expectation of payment when due is lacking. Surely the advances made before the will would have been none the less such though notes at one day had been taken for the several items or for the balances struck and carried forward from time to time. And they would as surely have been turned into [illegible] on the father's death by force of his will.

Counsel are fully aware of this and make (Brief, 2) the assertion, which they often repeat, that William "*borrowed*" these sums (greatly exaggerating their amount by adding the total amounts, ignoring large credits applied on some before others were incurred, and ignoring the fact that some of them overlap each other) and that the transactions were "*loans.*" They seek by this to give them a strictly commercial character and to ignore the moving of the father's heart which gave them exactly the same nature as the advances already made and put them among the advances contemplated by the will.

William did not borrow the $125,611.74. It was in fact paid without his knowledge and even without his en-

tire approval at the time, as the passage above quoted from his letter of July 12 shows: "When the crisis came my only thought of help in this was through you and father, but had not collected myself sufficiently to act when you suddenly paid in $126,000.00." He did not borrow any of the other amounts. They were not *loaned* to him. They were paid for him and on his account and he became liable for them, with or without the notes afterward given, but they were *advances*—family and not business matters.

Being therefore, exactly the kind of obligations forgiven by the will, it might well be maintained, as we have said above, that only a change in the will could avail to deprive them of the forgiveness. But if it be a matter of intention, that intention *must have been the father's* and the one *which was impressed on the transactions at the time they took place*, as the cases above cited show.

Searching, then, for evidence of an intention on the father's part to make advances which should not come within the absolution written in his will, we find that there was not the least hint of such intention, by any one, at the time the several advances were made down to the date we have now reached, October 15th. John's reference, March 9th, to the mode of entering the advances is entirely too vague. It was not made as a statement of intention to reduce William's share under the will, even if John's intention were the one to be sought, and William's answer, March 15th, shows he did not so understand it. Even when John, October 1st, mentioned the expectation of stockholders, &c., that William "would inherit a great estate some day," and their consequent desire for a judgment against him, he gave no intimation of a design to charge these advances to William's share, as against him. *It in no way appears that the father had ever thought of such a thing then, or ever did so later.* In fact

the answer merely avers (Rec., 23) an agreement and intention between *John* and *William* and does not say the *father* ever knew, authorized or approved.

On October 15th the following advances had been made, the statement (Brief, 22) being correct:

February 15.....	$125,911.74	—note given Feb'ry 22
March 19.....	15,027.00	—note given October 22
August 20.....	5,041.67	—note given October 22
September 25.....	7,400.00	—note given October 22
Total.....	$153,380.41	
Less realized on securities to that date.....	30,800.00	Notes all dated back. See letters of Oct. 15 (*Post*) and Oct. 22 (Rec., 187).
Balance.....	$122,580.41	

See credits endorsed (Rec., 163 *et seq.*)

On this day, October 15tl. (Rec.. 165), John writes, speaking of the Labrot trust, "I can't help but be uneasy about this matter. A large sum of money must be paid, and soon. *If not settled in father's lifetime it will be bad for you.*"

Counsel omit this part of the letter in quoting from it. (Brief, 25). It is easy to see why. This passage could have but one meaning. If this liability should be met by an advance by the father in his lifetime, *it would be forgiven by the will.* If not, William would have to pay it himself *out of his share of the estate*, for he had nothing else in prospect at his age.

The passage quoted by counsel is, "As the intention of creditors to take judgment against you is apparent, they hoping to get them out of father's estate (your share), Moore & Hager advise me to take your notes in his favor *at one day* for payments made. That under his will as written it is doubtful whether we could hold claim on an account," etc. This shows on its face persistence in the original design of foiling creditors in their attempt to reach

William's share, but taken with the preceding part quoted above, all possibility of doubt is removed, that this and nothing more was what was in the minds of all parties.

As showing the continued family and uncommercial character of these advances, note the passage at the end of this letter: "You will find items *paid* in father's account *which I do not think I have advised you of*, as to interest and exchange."

Whenever it was that Moore & Hager suggested and prepared the form of paper charging notes on William's share, certainly they were not sent to William, who had been in New Haven, Conn., since the summer (see letters of August 5th and October 24th (Rec., 186, 193). They were not used with the notes sent in letter of October 22d.

October 20th, referring to the Labrot debt, John writes (Rec., 374): "Maggie, dear girl, would sacrifice her whole fortune if you needed it, but this you would not wish done, neither would I permit it to be. *I think we can pay your debt, but I shall do so in such a manner that the amount shall not be a dead loss to ourselves nor to father's estate.*"

This plainly refers to making the most of securities, etc., so as to reduce the amount required. The fact that nothing is said about charging the payments to William's share, when it would have been natural to speak of it, is significant.

October 24th (Rec., 186), William replies:

"Of course I do not know what our sister Maggie has written you, but I do know how great her heart is, and how kind she as well as all of you have been. I will depend on you to protect her against her own generous impulses when I am concerned, as I should be greatly distressed *if I thought her making all the sacrifices for me.*"

This shows how William understood the letter to which he was replying.

November 3d (Rec., 394) John first mentions his scheme to secure a dismissal of the prosecution by paying $75,000 to the agent of the stockholders of the bank, and asks William to send his note at one day dated November 1st, the day he had made the deposit of $75,000.

John's letters of November 16th and 28th (Rec., 375–6) show that the intention always was to have Margaret advance the amount required to settle with the Labrots. The mention of settlement afterward relates to her only.

The letter of November 16th is the first which refers to Moore & Hager's form of note which John suggests be used for the $75,000, deposited to stop prosecution.

November 19th (Rec., 376) John, in asking for a note for $1,620, advanced, says: "Better use form by Moore & Hager." It was used only for this note, the $75,000 note (dated back to November 9th) and the $45,000 note (dated November 22d) being for the last three advances made, save that of December 3d for $2,713.88, the last, on which it was not used (Rec., 162–5).

We have thus gone through all the letters, omitting none which throw any light on the matter, from the time of the first advance to the last advance—nearly ten months—because they must certainly prevail over the mere inferences and recollection of a witness speaking long afterward and pending litigation, when the good father had gone and the noble family spirit with him. They fully justify what the Court of Appeals said of them (Rec., 617): "He (John) speaks in them of taking notes, but there is no intimation that they were to be taken for the purposes for which they are now sought to be used, and so of the

pledges attached to some of the later notes. They signify, on the contrary, that the object was to put up a bulwark against the attacks of creditors," etc.

Among the charges made against William's share on account of these advances are the following:

Balance of $125,911.74 note, with interest.....	$51,677.90
Balance of the $15,027 note, with interest	6,583.64
Amount of the $5,041.67 note, with interest..	5,685.32
Amount of the $7.400 note, with interest.....	8,301.56
Amount of the $2,100 note, with interest.....	2,345.70
Amount of the $497.13 note, with interest....	554.04
Total.....	$75,148.16

All these advances were made before there was any suggestion of charging them on William's share, whether that suggestion, when made, was with a view of protecting his share from creditors or of charging it. If John had any idea of making such a charge during this period it was never clearly disclosed. On the contrary, the remarkable passage in his letter of October 15th shows he then had no such idea. The Court of Appeals justly said (Rec., 617): "We greatly doubt whether John Means had at any time (viz., during the transactions) any desire or intention to treat the advances made for William as excluding him from his share in his father's estate."

Long after all the advances had been made, April 18, 1889, John wrote William (Rec., 377), "*My own selfish interest was against any payment. Have done what I did for your benefit only.*" How could this be true if all payments were on account of William's share? They knew it would be large enough to cover them, considering his securities which were obtained.

That at a much later period such intention was formed by John and his son and nephew, who became adminis-

trators with the will annexed, is equally clear. *But there is nothing to show that the father ever, at any time, had such purpose.* The testimony is undisputed that he retained his faculties until the summer of 1889, when he became imbecile. (Rec., 103, 121, 471–2.) His acquiescence, according to John, in John's method of keeping the account of these advances, was given at the time they were opened. The vague account of this given by John does not inspire the highest confidence, considering John's interest and present feelings toward William's family. See comment of Court of Appeals on John's testimony on this subject. (Rec., 616.) But assuming that such acquiescence was given, it must have been on the theory that it was necessary, like the giving of the notes, *to protect William's interest, not to consume it*, for we have shown that *at that time John himself had no other purpose.*

We submit that the record amply justifies the finding of the Court of Appeals (Rec., 615), "but there is not much, if anything, in all this, or in anything else disclosed by the testimony, to prove that Thomas W. Means had a purpose to banish William Means from his favor, and isolate him from the benefits of the plan of distribution of his property after death, which had become the settled purpose of his life."

"He knew that his son was in financial distress, and he came forward, as was his wont, to help him out and re-establish him on solid ground. We are fully persuaded that we do him exact justice when we refuse to believe that he had then (at the time of the advances) any thought of inaugurating a new plan of dealing with William's expectancy. And if he did not then have such purpose there is nothing in the evidence to justify the belief that he at any time afterward formed one." (Rec., 617.)

The items, other than those amounting to $75,148.16 above given, which make up the $136,035.75 charged against William's share by the Administrators are:

On note for $75,000, dated November 9, 1888...	$6,075.50
On note for $1,620, dated November 17, 1888...	1,803.33
On note for $45,000, dated November 22, 1888..	49,995.00
On note for $2,713.88, dated December 3, 1888..	3,013.26
	$60,887.09

The total is made up of the two classes as follows:

Total of advances before mention of charge against William's share	$75,148.16
Total of advances after mention of charge against William's share	60,887.09
Total.....	$136,035.25

Let us now consider the items of the second class.

The first item is $6,075.50 interest on the $75,000 deposited to stop prosecution. The deposit was made November 1, 1888. It was John's check for $25,000, and Sinton's acceptance for $50,000. (Rec., 92.)

The agent of the bank collected the check, for some reason, but not the acceptance, which was simply held and returned February 28, 1890. The acceptance, therefore, could not be the subject of any interest charge. Yet this item is 6 per cent interest on the entire $75,000 for the whole period, one year and four months! While John (id.) speaks of Sinton's paying the $50,000 back on the return of the acceptance, it does not appear that this amount had been deposited with Sinton in money. If in securities, they drew interest, and even if in money, no circumstances are shown to justify a charge for interest.

In this connection we call attention to the fact that of the $136,035.25 charged against William's share by the administrators a careful computation shows that $26,635.61

was for interest, mostly for time before the father's death, although he had never in his life charged any of his children interest on his advances to them, and there is no evidence of a different intention on his part here.

The second item is for the $1,620 advance of November 17, 1888, with interest.

The third item is for the $45,000 on account of the Labrot trust, with interest from the date of William's note, dated November 22, 1888, amounting to $4,995. The plan for meeting this debt was for Margaret to give her note to the Labrots and the father to give her his note. (See letter November 28th, *supra*.) Margaret never gave her note at all. John claims he executed a note to her as agent for his father, but she never saw it. He says he "probably" put it among her papers in the bank and that when the $75,000 deposit was returned, February 28, 1890, he got the note and paid it to her. (Rec., 426.)

Margaret did pay the Labrots after the father's death, and then undoubtedly became William's creditor for the amount, with interest *from that date*. But the only consideration for a note from the father to her was to be *her note to the Labrots, which she never gave*. (Rec., 426.)

It is admitted by counsel (Brief, 35) that the father never knew anything about the Labrot matter, that he was "on the verge of imbecility when the note was executed to Margaret, and a confirmed imbecile, under the care of a committee and incapable of making a gift when the money was paid, February 28, 1890." Then, by the same token, John's authority was revoked when he undertook to pay this money to Margaret on a note which would have been invalid even if delivered, because it was wholly without consideration.

We are not seeking to exculpate William from any just

obligation, but merely to show that his real creditor in this instance was his sister, not his father.

The amount of this interest charge can not be justified on any theory. The money was not paid by John until February 28, 1890. The interest to the father's death, June 8, 1890, would be only $735, and to the time the charge to William's share was made, October 6, 1890, only $1,620. The amount charged was $4,995.

The fourth item is the $2,713 advance made December 3, 1888, with interest, making in all, $3,013.26. The notes given for the last three preceding items contained the charge on William's share. The note given for this item did not, though it was given after the others.

If counsel rely on the clauses in the three notes which purport to charge them on William's share, the amount actually charged can not be justified, as it included every advance made and one which was never made, as well as those three.

If their reliance be on the paper William gave after his father's death, directing that all the advances be so charged, the fact that it was wholly without consideration and was given after William had parted with all control over his share, as will appear later, deprive it of all force and effect.

THE INTENTION OF THE TESTATOR IN ITEM 5 WAS TO INCLUDE ALL ADVANCES WHICH HE MIGHT THEREAFTER MAKE.

Counsel suggest rather than argue, quoting from Judge Barr (Brief, 55), that the advances in question are not covered by Item 5, because they were not charged against William on the books.

The will recites that the father had made advances to

his children, which are charged to them on his books. We have already seen that these charges covered every transaction of every kind up to that time between him and his children. So it is clear that he meant to discharge them from every sort of obligation incurred up to that time. We have seen, too, that he took the pains, when he drew his will, to discharge Culbertson by a separate release.

It declares further that he may thereafter make advances to his children which may be charged on his books. This clause of Item 5 was merely a *recital* of his past dealings with his children and his expectation to continue them. He, therefore, in view of his previous habit, naturally mentioned charging in his books as a *circumstance*. But when he came to the *directing* clause, *he did not declare this as a condition*. Mark, he did not say, advances "that may hereafter be made, *and that may be charged on my books*," should be treated as executed gifts. The omission of this latter clause shows that his purpose was not so to limit the advances to be discharged, but was to cover all advances in the future just as he covered all advances in the past. He did not say he intended to charge in his books such future advances as he meant to forgive. No such distinction was in his mind.

In view of the character and purposes of the testator as disclosed by the record, the design of discriminating among future advances according to the fact of their being charged on his books or not, can not reasonably be imputed to him without a clear expression in his will.

This court, by Mr. Justice Harlan, said in *Gilmer* v. *Stone*, 120 U. S. 586, 590, speaking of evidence showing the history and situation of the testator:

> The purpose of it was to place the court as far as possible in the situation in which the testator stood,

> and thus bring the words employed by him into contact with the circumstances attending the execution of his will. * * * * The law is not so unreasonable, says Mr. Wigram, as to deny to the reader of an instrument the same light which the writer enjoyed.

Reading the language of the testator in this light, this court said by Mr. Justice Matthews in *Robison* v. *Portland Orphan Asylum*, 123 U. S. 702, 707, that the court "will so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of the opinion that he has on the whole will sufficiently declared."

But if charges were the test the result would be the same, *for charges were made on his books of every one of the advances in question*, which answered in substantial form all the requirements of the will so construed. The notes in every instance followed (Rec.,427, Q. 719)—always some days, sometimes some weeks or even months after the advances had been *made and charged*, and were the result of after-thought. These notes so given did not in any manner change the original nature of the transactions or the effect of the charges on the books, but the charges stand just as they would stand if no notes had been given. The fact that John saw fit to charge these advances in what he called "current accounts," makes no difference. John testified that he considered the old accounts closed, and counsel claim that they were closed. These accounts were in the same book. One was with John (Ledger, 243), the other with William (Ledger, 223). In them are charged and credited promiscuously the various advances and sums realized from the sale of William's securities from time to time. The notes he afterward gave for the advances are included in them. Taking these two accounts together,

John being the agent of his father in the matter, they are exactly the same as a single account between the father and William.

Surely the benign purpose of the father as expressed in his will is not to be defeated by John's manner of bookkeeping.

A significant circumstance in connection with these accounts is that John says in his letter to William, October 15, 1888 (Rec., 166): "Your account with father and myself and account '*Adventure Cincinnati*' sales and disposition so far as made of stocks, etc., received from the Metropolitan National Bank receiver—and from yourself." He also calls attention to "*father's account*," but no such accounts have been produced, though all accounts were called for. The father's ledger account furnished closes September 8, 1880 (Ledger, p. 311). John also refused to produce a certain letter from William. Our reference for this is to a part of the record not printed, to which counsel also refer (Brief, p. 58, for Q. 157).

The evidence fully warrants what the Circuit Court of Appeals said (Rec., 615):

"It does, indeed, appear that by the father's acquiescence upon the suggestion of John, who had the handling of his father's books, the account of these transactions was entered in a distinct place in these books and they were kept separate from the former accounts with William. But there is not much, if anything, in all this, or in anything else disclosed by the testimony, to prove that Thomas W. Means had a purpose to banish William Means from his favor or isolate him from the benefits of the plan of distribution of his property after death, which had become the settled purpose of his life. *It was immaterial to that purpose in what book or how the account was kept.*

Whenever and however kept, the charge would fall under the provision of exclusion by the will in the end, and the details of the bookkeeping he may well be deemed to have left to John, who had all such matters in charge. He had himself become blind and incapable of supervising his books in person, and as he confided in John there was no reason for his going over them with the help of others, even if we assume that there was something on their face which disclosed this extraordinary purpose, which, indeed, we think is contrary to the fact." And, after quoting from John's testimony: "As the father undoubtedly intended to keep it as an indebtedness, John's statement to him imparted nothing more than the mere question as to the best mode of doing the business 'in the shape to indicate and show an indebtedness,' and there is nothing in the very full detail of testimony given by John to show that on any occasion the idea of establishing an indebtedness beyond the scope of the will was ever broached to his father, or that anything ever fell from him to show that such an idea had occurred to him. There was no suggestion by John to William at the time when he came to his relief, that anybody expected that the money which was being supplied to him by his father was to be put beyond the operation of the will, or would stand on any special footing in that regard. On the other hand, we think the moral probabilities are all against the appellees' contention."

DOCTRINE OF ADEMPTION NOT APPLICABLE.

We can not understand why counsel speak of ademption. The question of ademption could arise here only in case of gifts. Counsel claim and we admit that we are not dealing with gifts; and they admit that if the advances in

question had been gifts they would not be chargeable against William's share.

The earlier rule in England that the doctrine of ademption does not apply to residuary legacies (see Lord Hardwicke in *Farnham* v. *Phillips*, 2 Atk. 215) has been abandoned there. See *Thynne* v. *Glengall*, 2 H. L. Cas. 131. It prevails, however, in some of the States. See 9 Bush 95, 13 id., 51; 3 Sneed 235; 17 Ind. 159; 38 Ark. 449.

But everywhere and always the question is merely whether the intention was to anticipate the legacy by the gift. And the intention must have been *the testator's*. Even in case of a specific legacy, which is always held adeemed by a sale of the subject, its sale by an agent without the testator's direction was held not to adeem, but the legacy was made good out of the general estate. *Patton* v. *Patton*, 2 Jones Eq. (N. C.) 494.

The position of counsel seems to be that John's agency included the right to adeem or satisfy his father's legacies. If such power can be delegated at all by a testator, it certainly was not covered by the power of attorney to John, which was plainly intended to cover only ordinary business matters. (Rec., 115.) So extraordinary a power as that assumed by counsel would require express mention.

Besides, the doctrine of ademption is founded entirely on a presumption that double portions were not intended. It may well be doubted whether sums advanced by a father to save a son from disaster and the family name from stain would be held to be a "portion," which means a provision of some sort to be taken and held by the child, not money spent for his relief from trouble. But in view of the terms of this will, we do not see how those advances can be presumed to have been intended to be in satisfaction of William's equal residuary share. On the

contrary, the presumption is the other way, and clear proof is required to overcome it, if, indeed, mere evidence can prevail against this will at all.

The cases cited under this head are, of course, all questions of *gifts*.

Richards v. *Humphreys*, 15 Pick. 133, however, announces well-settled rules which have a strong bearing on this case:

> 1. "Nor would it be admissible to show such declarations alone to prove the direct intent of the testator to revoke or adeem a legacy. It would be, in either case, to make and revoke a will by parole, which is alike contrary to the general rule of law and to the statute of frauds. But when the act is done * * * * evidence of declarations of the intent may be given to qualify the act," etc.

The declarations received were "*made at the time of the advance and payment of money*" (p. 139).

> 2. The question "depends solely on the will of the testator." The legatee was a married woman whose release was claimed to be invalid. But "had the money been paid to trustees or others for her benefit, without any act or consent of herself, if given expressly in lieu or in satisfaction of such legacy to her, it would have operated as an ademption."

In *Quarles* v. *Quarles*, 4 Mass. 680, a case of intestacy, the father's deed of conveyance and the son's deed of release of all right of inheritance were contemporaneous, and held to be in effect one instrument. This was held to bar the son's children under the Massachusetts statute of advancements, the son having died before his father. This decision was by a divided court, and is not followed in Ohio. See *Needles* v. *Needles*, 7 O. S. 432, 446.

The notes given for three of the last advances, which

contain the clause purporting to charge the share, like all the other notes without exception, were given after the advances were made.

The paper of June 16, charging all the notes on the share, and that of October 16, receipting for them as payment thereon, were not only given long after the advances, but after William had made an agreement to transfer his share to the trustees, which, of course, in equity, was equivalent to such transfer.

WILLIAM'S AGREEMENT TO ASSIGN HIS SHARE TO TRUSTEES FOR HIS FAMILY.

After all the advances had been made it was thought best to send William abroad. He went, and remained one year. He had turned over all his property to John, and it was understood that his family, which was left behind, should be provided for. Because this was not done, or not properly done, and for other reasons, dissensions arose between William's wife and John. On William's return trouble broke out between him and his family. His wife made claims for alimony and for her separate estate, of which he had charge, and there were other causes for the feeling which became bitter.

As the Court of Appeals truly found from the evidence, "Since his (William's) downfall he has been broken in spirit and wavering in his purposes." (Rec., 620.) "He seems to have been unsteady in his course, sometimes inclining strongly to his father's family, and seeming to be anxious to secure their affection and favor, and willing to do as they wished to that end. At other times he turned to consider the welfare of his own family and his own obligations toward its members." (Rec., 619.)

In February, 1890, in settlement of these troubles and

claims, as well as to make provision for his family, he finally agreed to transfer his share in his father's estate to trustees. (Rec., 293, 455, 579, 595, 274.)

Counsel do not now deny that such an agreement would have been valid. It would, of course, create a mere equity and no conveyance could be made until the expectancy became an estate. But the assignor, when he receives the estate after such agreement, holds it as trustee for the assignees.

It is well settled that such agreements are always upheld in equity, especially when they are family settlements.

Hinkle v. *Wanzer*, 17 How. 353 and 368.
3 *Pomeroy's Eq. Jur.*, sec. 1270.
White & Tudor's L. C. in Equity, p. 1606.

The evidence that such an agreement was made is conclusive.

In an account of an interview with Mr. Glidden in January, 1890, on the subject of Mrs. Means' claims, etc., Mr. Hagar says (Rec., 580) Mr. Glidden said that "the expectancy might be the subject of an equitable settlement upon the part of Wm. Means upon his wife and members of his family," etc.

We are, therefore, prepared to find this idea carried out.

The decree against William shows that such an agreement was made during his father's lifetime. *The entire record was put in evidence by these petitioners themselves* (Rec., 456), doubtless with the idea of attacking it for collusion as averred in the answer (Rec., 27), or to show knowledge by the trustees of the fact they set up in that case that William was insolvent. Whatever the reason, it was put in generally, without any restriction. It included the peti-

tion whose averments the decree expressly found to be true. One of them was that the father "was then living," viz.: when the agreement, whose exact date is not stated, was made, which was the sole basis of the suit, and whose specific enforcement was the only relief asked or given.

The pleadings must always be considered with the decree to understand its effect, as this court held by Mr. Justice Story in one of the cases cited by counsel (*Owings* v. *Hull*, 9 Pet. 607) in which the objection sustained by the court was to the use of depositions, etc., improperly included in the transcript. (See pp. 610, 622.")

When a judgment is the source of title the record of it, including the pleadings as held in *Owings* v. *Hull*, is always admissible against strangers, though not conclusive as to them.

Barr v. *Gratz's Heirs*, 4 Wheat. 213, 220.
Burton v. *Forsythe*, 20 How. 532.
Dirst v. *Morris*, 14 Wall. 484.

The cases cited by counsel (Brief, 57) did not belong to this class, and therefore have no bearing.

In *Hinde's Lessee* v. *Longworth*, 11 Wheat. 199, 211 records of judgments were offered to show indebtedness by the grantor at the date of conveyances made *before the judgments*. They were admitted, though the judgments were *res inter alios*, to show indebtedness (p. 210). *The accounts on which the judgments were founded* being set out in the records, it was held that "*They may be looked to for the purpose of showing that Doyle, the elder* (the grantor), *was in debt at the date of the deed*" (p. 211).

It was held that if these accounts were not properly part of the record there should have been specific objection to them. The act of the petitioners here in putting this

record in evidence generally, is *a fortiori*, a waiver of all objections to a like use of every part of it; and the petition being sworn to has naturally greater probative force than the accounts in the case just cited, quite aside from its effect in connection with the decree, of which it is in fact a part.

The decree is meaningless and of no effect, except as it finds and enforces the agreement in the father's lifetime, set up in the petition, upon which it was granted.

The testimony of Whitaker and Williams shows that this agreement was made in February 1890. It is not disputed and is not to be brushed aside by adjectives. It should be stated, however, that the record shows counsel below relied on the decree and the deed. What testimony there was showing the agreement came out either on cross-examination or in elucidating other matters.

Mr. Whitaker's testimony covers both the making of the agreement and notice of it. He went to Ashland late in February, 1890, to effect the carrying out of this agreement by securing the co-operation of John, the father then being imbecile and his death expected at any time. Not being able to see John he saw his son, E. C. Means, one of the petitioners. He testifies that this agreement was made in his presence ten or fifteen days before at the office of Hon. John Little, in Xenia, Ohio (Rec., 598), and that he so informed E. C. Means (Rec., 595–6–7).

Counsel put a strained construction on this testimony when they say (Brief, 61) that it shows "that he went to Ashland not to give notice of a contract already made but to get John Means' assistance to bring about an arrangement." It was naturally supposed that the assent and co-operation of John Means, who controlled the father's affairs and would control his estate, would greatly facilitate the

carrying out of the arrangement already agreed on. This manifest purpose of Mr. Whitaker is entirely consistent with his direct testimony that the agreement had been made in his presence and explains his expressions on which counsel found their assertion, such as that he went to Ashland "to, if possible, effect the execution of this trust" &c.

As the result showed, it was one thing to have William *agree* to put the share in trust, but quite another to *secure* it. Suit against William was finally required to accomplish what it was thought John's influence and his own agreement would bring about.

Mr. Williams testified: (Rec. 293.)

"A long time before the death of Thomas W. Means, we had a meeting at Xenia, O. John Little, Mr. Glidden. Mr. Whitaker, Mr. Means and myself were present to adjust the family claims. We there and then agreed that the expectancy in the estate of Thomas W. Means of William Means should be turned over to these children. That was the main conference we had about the matter up in Xenia, and William Means agreed to settle upon his children his expectancy in that estate. That contract was made in the presence of all us lawyers—and agreement and adjustment."

The quotations counsel make from his testimony do not overthrow this direct and positive statement. They are fully explained by the evident fact that, the agreement being verbal only, attempts were made to reduce it to writing, which attempts had no result. The quotations made (Brief, 58) refer to a deed made years before and are therefore wholly irrelevant save as showing that the subject was not a new one in the family. It is hardly fair to say the witness evades an answer (Brief 58) to one of the questions on this irrelevant subject.

The letter of this witness of October 18, 1890, does not contradict his testimony. His reference to the threatened suit by William's wife for alimony is entirely consistent with the fact that William had made the agreement but was trying to repudiate it. So of his statement that "Madam and the children were after us pretty hot" (Brief, 59). Mrs. Means would naturally threaten all sorts of suits when her husband refused to keep his agreement.

This witness' letter to Dakin (Rec., 568) shows that his claim and advice to William were that this agreement "was only an unexecuted gift which can not be enforced in law." This accounts for William's conduct in mortgaging part of his interest and in seeking to get something for himself by giving the receipt to estate for the amount of the notes.

The finding of the Circuit Court against the existence of this agreement was founded on William Means' conduct and his letter to his sister which refers only to a trust deed and does not mention an agreement to assign (Rec., 460). Neither was competent (*Clements* v. *Moore*, 6 Wall, 299-313) except possibly in so far as his own interest as a beneficiary is concerned, but its effect was not so limited. Objection was duly made (Rec., 454). That court also overlooked entirely the effect of the record offered by the petitioners which alone is sufficient in the absence of opposing evidence.

William persisting in his refusal to carry out his verbal agreement, suit was brought May, 1891, to enforce it. After full hearing the court granted a decree, and William, after several months' delay, finally complied with it by executing a deed in which he recited that it was to carry out the verbal agreement of February, 1890. There was no objection to either deed or recital (Rec., 346). This evidence also the Circuit Court overlooked.

If petitioners had made payments to William on account of his share, the question of notice would become important. As they do not claim to have done so that question does not arise. If it did Mr. Whitaker's evidence shows notice (*supra*).

What they rely on is a receipt by William October 16, 1890, dated back to October 6th, for $136,911.74 on account of his share. It is admitted that they in fact paid him nothing whatever, the amount receipted for being merely the sum of the amounts remaining unpaid of the notes given as above stated, with interest to the date of the receipt.

We take it to be elementary that even a release under seal by one who had theretofore transferred his claim, if given without any real consideration or any change of position to his detriment by the releasee, would not affect the rights of the assignee even though no notice had been given. And in equity it would make no difference whether the transfer was of a legal or an equitable character.

The petitioners have not in any wise changed their position to their detriment by reason of this receipt, nor are there any grounds whatever for estoppel. They rely on the receipt as payment on two grounds only:

1st. That the advances represented by the notes were not covered by Item 5 of the will and were therefore chargeable against the share.

2d. That even if this were not so, there was a *bona fide* dispute between them and William which the receipt was given to compromise.

The first ground depends on the main question already discussed. If it be found valid, the case ends; for the trustees claim no greater rights than William had when he made the agreement in February, ~~1850~~ 1890.

The second ground, which is reached only in case the first be overthrown, depends on the success of counsel's attempt to make a compromise out of an absolute surrender by a beneficiary to his trustees of large and valuable rights for which he received nothing at all.

The real nature of the alleged compromise, which it is solemnly said the court should refuse to disturb, will appear by a

STATEMENT OF FACTS AFTER THE TESTATOR'S DEATH.

Nothing of consequence occurred after February, 1890, until after the father died, June 8th, 1890. The petitioners were not appointed until July 28th, but on June 16th they obtained an order from William dated on that day at Ashland, Ky., directing that the representatives of his father thereafter to be appointed should charge the notes he had theretofore given against his share (Rec., 433). They had this drawn and gave it to Mrs. Adams to ~~let~~ get William to sign it. (Rec., 475–6.)

The next day, June 17th, they got from William a second paper explaining that his object in signing the paper of June 16th was "to insure the estate against loss through the purchase of such obligations no matter how obtained, and for no other purpose whatsoever." (Rec., 434.)

On July 28th, before the petitioners qualified, William delivered to them a revocation of the paper of June 16th, giving his reasons at large, one of which was, "That said paper was not to be delivered without my consent," and another that "Said paper was not intended to be used in any manner against my interest or desire."

The mental, moral, and physical condition of William at this time plainly appears from the fact that, although his

revocation was made after advice as to his legal rights, the nature of which advice nowhere appears in the record, he nevertheless on October 4th *revoked the revocation by endorsement thereon.* (Rec., 436.)

No meeting nor anything whatever had occurred in consequence of the suggestion in the letter of his counsel of July 28th, which accompanied his revocation. What occurred on October 4th and afterward had, as the record shows, no relation of any sort with that letter.

This extraordinary conduct is accounted for partly by his condition and partly by the fact that the design of getting William's share under cover until the storm should blow over was again taken up. His family, as well as his creditors, were threatening. (Rec., 344–5.)

The "independent advice" which counsel say William Means got from Mr. Baker, at the time the receipt was given, October 16th, was "that it is a well settled rule of law that a man who gave an administrator a receipt for more money than he got, did not estop himself from afterward claiming the balance that was due him." (Rec., 346.) Mr. Baker at the time was not advised as to the provisions of the will, which cut no figure in the transaction (Rec., 346).

It is simply begging the question to say that the petitioners occupied no trust relation to William in the matter because their dealing was "*in respect of a debt asserted against a legatee*" (Brief, 75), for we do not reach this part of the case at all unless and until it has been determined that Item 5 *had forgiven these very debts.* Then they have themselves become part of his legacy, and asserting them in any way was depriving him of his legacy.

Advice of their counsel may avail petitioners as an excuse, but it can not justify or give legal effect to their

conduct. It may shield them from a charge of actual bad faith, but can not relieve them in any degree from the high obligation of trust which imputes to them the real wrong they did to the beneficiary of their trust.

Counsel have invented a new use for advice of counsel, which, if sanctioned by this great court, will soon reduce the law of trusts to the level of the law of malicious prosecution.

We understand that the wholesome rules relating to trusts so override the ordinary rules governing transactions between strangers, such as that relating to voluntary payment, that if William had, even under the erroneous advice of his counsel, *paid* these notes to petitioners, the continuing obligation of their trust would still attach to the money and they would hold it for him, at least until, they acting in good faith, something should call the law of estoppel into play.

We have stated the exact facts about the alleged "compromise" which, it is said, resulted in the receipt for virtually William's entire share of his father's estate (E. C. Means, Q. 343, Rec., 533). We are convinced that no reasoning of ours can add anything in this court to the argument that statement itself carries.

It disposes of the cases cited on the subject of the compromise of disputed claims, not one of which, nor any other of which we are aware, was between trustee and beneficiary or involved an entire surrender on one side and no consideration whatever on the other.

The practice of more than a century has substitued application to a proper court for construction of wills and other trusts, and its decision of the rights of beneficiaries, for the ordinary methods of adjusting rights between stran-

gers. If trustees can ever by compromise or settlement with their beneficiaries deprive them of any part of their actual rights, it could only be, as in case of other parties, by mutual concessions. If, there being a real dispute (which appears not to have been the case here), it had been agreed that part of the notes should be taken out of the legacy and the other part surrendered, the transaction might be treated as a compromise. As it was, the essential element of compromise was lacking. It was present in every one of the cases cited by counsel on this subject. This transaction did not even savor of compromise.

THE AVERMENTS OF THE BILL JUSTIFIED THE DECREE OF THE COURT OF APPEALS.

The part of the bill directed against John Means was dismissed and there is no appeal, so it does not figure here.

The bill as against the administrators avers their refusal to recognize the trustees in the distribution of the estate, although they had distributed to each of the four legatees, other than William, more than $44,000; that they had obtained the receipt for $136,035.75 from William by collusion with him to defeat the rights of the trustees, or by fraud upon him, and now set up such receipt as a *pro tanto* distribution to his share; and that even if procured without fraud or collusion such receipt "*would have been invalid and void as to your orators*" (Rec., 13), by reason of the facts averred, viz.: the agreement whereby William's share was no longer under his control and the conversion of the advances made him by his father into gifts by the will. (Rec., 11).

The relief prayed was that the administrators be ordered to pay over to the trustees the full one-fifth interest of William under the will (when it became payable) without reference to said pretended receipt which they prayed to have canceled; that an amount equal to that already distributed to the others be ordered paid the trustees forthwith; and for general relief.

There is not a word in the bill about any compromise or settlement with William, either in the averments or in the prayer. *Nor is there in the answer* which, like the bill, treats the receipt, according to its own terms, as evidence of *payment* to William of his share in his own notes given for advances *without a word importing compromise or other agreement.* The "settlement" of October 6th, mentioned at the end of the receipt, as the undisputed evidence of petitioners themselves shows, was not a compromise or agreement at all, but merely the computation of balances and interest on the notes by the petitioners themselves *when William was not present in person or otherwise* (E. C. Means, Rec., 488, Q., 30 and 31; T. M. Adams id., 439, 444, 474–5, Q., 67, 109, 312).

Omitting every averment about collusion with William or fraud upon him, the bill states a complete case for the relief adjudged.

The fraud, though alleged as one of the grounds of suit, was no more essential to the relief given than it was in *Smith* v. *Kay*, 7, H. L. Cas., 751, where relief was given although the fraud set up was not made out.

THE BILL NOT PREMATURE.

The statements just made show that the bill was not pre-

mature. The trustees' right to sue for their share on the partial distribution already made was undoubted, as well as their right to compel the recognition of their title to the share, notwithstanding the pretended receipt, in advance of the time fixed in the will for full distribution. And the court, once acquiring jurisdiction, had the right to retain it for complete relief, the period named in the will having expired long before the trial.

SUMMARY.

I.

The testator's plan was that his children should have equal portions at his death, whether his advances to them during his life should have been equal or unequal. Living he had always judged their needs and interests and dealt with them accordingly. This he would continue to do. When he must leave them to themselves and divide the large estate he had, until then, held as a reserve behind the line of his children in their struggle with fortune, he would then start them afresh, on an equal footing, and let the past be buried with him.

This is shown:

1. By the explicit terms he used.

2. By the fact that from the beginning—a period of over twenty-five years—his advances had always been greatly unequal and were so then.

3. By his unvarying habit of using his large means to aid or relieve his children, without regard to equality, which course the will shows he expected to follow to the end.

II.

That by "advances" he meant to cover all benefits conferred, although they created indebtedness to him, appears:

1. From the meaning of the term itself.

2. From the fact that all money and property theretofore received from him by his children, or expended for them, had been charged to them as debtors on his business books, and the charges always treated as existing debts.

3. From his releasing a son-in-law from a large indebtedness a few days before he made the will.

III.

The meaning of the will is not to be affected by anything the testator afterward said or did. As he made no later *testamentary* expression, even a change of intention, no matter how shown or expressed, would have been ineffectual. Well settled and salutary rules would deny it effect. But there is no evidence of any change of intention, or in his habit toward his children, or that he meant to make an exception in Williams' case.

IV.

When he made the will his children had all reached mature age. They were all prosperous and, chiefly by his aid, had become rich. It was quite natural that four years later he should yield to the suggestion of equalizing their accounts. It was an apparent but not a real equalizing of benefits, as John, who suggested it, well knew. It did not even profess to include the grandson, who was left $70,000 behind.

But if the advances had then been all actually made equal and the accounts closed, it would have shown no intention on the testator's part to abandon his lifelong purpose, expressed in his will, of making further advances to his children or to "*some of them*," should occasion arise. It would simply have shown that he thought such occasion unlikely to arise.

But the unlikely happened. For eight years after the will was made the good old man enjoyed the result of his wise and generous treatment of his children. He was almost ready to "wrap the drapery of his couch about him and lie down to pleasant dreams" when trouble, which seemed to have forgotten his family, broke over it again.

It directly affected William only, but really touched the entire family, as every one knew and felt. It struck at good name as well as estate. The name belonged to the family. It came from the father. He did not stop to add or subtract, but his family pride and affection promptly sent his fortune to the rescue.

What he had done before for John, Mrs. Adams and Culbertson he did again for William. He did not *loan* him money. He did not provide him a *portion*. He went to his relief by large advances of money to pay off his debts. He put up $75,000 to buy his freedom from prosecution.

When he made the various advances to pay William's debts he received William's securities which his creditors held. These were sold and credited. The advances extended over a period of nearly a year. Their total was never at any one time greater than the amount of the first advance, and was generally less than one-third of the amount stated by opposing counsel.

V.

The father's uniform practice, so well known and long followed, would have repelled any presumption of an intention to make these advances gifts outright or by way of advancement, if nothing had been said or done.

Nothing was said or done when the first and chief advance was made. It was charged, the next day, on the testator's books as a debt, like all previous advances to every child.

Still later a note was given by William at the suggestion of John, who acted for his father. No matter why or when this was done, it was an after-thought and did not make the payment of the money any the less an advance like those so often made before to the others and to William.

But both the testimony and the letters written at the time show that the sole purpose in taking the note was to protect William's share under his father's will from suits threatened by stockholders of the ruined bank he had managed. This purpose originated with John and not with William.

No note was taken at the time any advance was made, but always afterward—sometimes long. They were always at one day and for the full amount advanced, ignoring credits already received from the sale of securities. But all the advances, except the first, were entered in the books when made.

All these advances created debts. But they were none the less advances, such as the father had already made, declared his purpose to continue making, and turned into executed gifts at his death by the express terms of his will.

The subsequent giving of notes made no difference. Nor did the attempt in three of the last notes, to charge them on William's share, because it is admitted that this was not authorized, approved, or even known by the father.

VI.

After the father died the petitioners were diligent in getting from William papers authorizing them to charge the balances of all these notes, with full interest, against his share. They had one, at least, of these papers drawn by their attorney and given one of the sisters to get William's signature. They did this before their appointment, and though he revoked this authority before they qualified, they endorsed on the paper their acceptance of the authority in spite of the revocation.

Notwithstanding his revocation William, partly to put his share beyond the reach of his family and creditors, partly to obtain some ready money for himself, gave a receipt for $136,035.75 as paid him on his share, that being the full amount of the notes less credits by sales of his securities and including full interest to that date.

Not a dollar was paid him. He received no consideration in any form. One week later he asked and received the few securities remaining unsold (Rec., 199), but they were of little, if any, value. They had not even been mentioned when he gave the receipt. As the will had turned his debts into gifts they were his already.

The receipt was, therefore, a mere form. It was evidence of no payment whatever from his trustees who took it from him. Their belief is immaterial and so are their actual motives. Trustees can not discharge their obliga-

tions by going through forms. They can not pay by making empty motions.

VII.

The claim that there was a compromise is wholly unfounded. The "settlement of October 6th," mentioned in the receipt, refers to a mere computation of the amount by the administrators themselves when William was not present or represented. There was not when the receipt was given, or at any other time, any compromise, nor anything which savored of compromise. There is not a word in the allegations of the bill, nor in those of the answer, about any compromise or settlement of any kind.

If, under the will, William was chargeable with the balances of these advancements which had not been met by sales of his securities, then his receipt evidenced a payment to him. If he was not so chargeable, then his receipt evidenced no payment whatever. It must, even as against William himself, stand or fall by the decision of that question. Nothing was done or agreed in connection with the receipt, which could, or did give it any independent force or effect.

VIII.

But even if the receipt could be upheld, as against William, on some theory of surrender or abandonment of his rights, it is of no avail here, because he had long before transferred them. Nothing could have defeated the perfect equity of his wife and daughters, but a purchase for value and without notice. It is not pretended that the transaction with William was of that nature.

Even an actual compromise with William would not have prevailed against that equity unless it amounted to

such purchase. Mere partial satisfaction of the claim he had assigned would give only a right to a credit or the return of whatever he had received.

If William's transfer of his share to his family had been a pure gift, the result would have been the same; but it was for value.

As nothing was paid William, lack of notice matters not. But there was notice.

IX.

The averments and prayer of the bill justified the relief granted, and the suit was not premature.

CONCLUSION.

If this court approve the present decree, every one of the descendants of Thomas W. Means will receive under his will not only a competence, but a fortune.

If that decree be reversed, not only one of his sons, but three of his granddaughters, will be cut off from the bounty provided in his will and left in penury, while a sum relatively small—about $27,000—will be added to the shares of the others, who already "have so much more than we need" (John to Mrs. William Means, August 16, 1888, Rec., 130).

Looking at the character and lifelong conduct of the testator, can there be any just doubt which of these two results he meant to bring about? Was it not to prevent exactly what our opponents seek to accomplish that he wrote Item 5? Did he not deliberately determine and declare that the equal shares provided by his will should not be affected by what he might do while he lived? When

during William's troubles and after them, he made no change in his will, nor ever by word or act expressed a purpose to alter its effect, was it not because he did not mean, for the first time in his life, to leave one of his children to bear alone a burden he was better able to bear himself, which would crush the child and his family, but could be lightly borne by his large estate?

Respectfully submitted,

JOHN MASON,
JOHN J. WILLIAMS,
H. P. WARNACK,
For Respondents.

JOHN LOWRIE,
Of Counsel.

CINCINNATI, December 5, 1898.

NOTE.

The regular reports of the opinion of the Circuit Court of Appeals are 24 C. C. A. 198, and 78 Fed. 536.